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IN THE

Supreme Court of the United States

October Term, 1964.

No. 391

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, on Behalf of MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Petitioner, Democratic County Committee of Philadelphia, on behalf of Michael A. Musmanno, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, the highest court of the Commonwealth of Pennsylvania, entered in the above-entitled case on July 27, 1964, disfranchising 5,624 voters in the City of Philadelphia, the order dated August 6, 1964, subsequently changed to read August 7, 1964, and the order dated August 11, 1964, denying the Amended Petition for Reconsideration and/or Reargument, filed on August 6, 1964.

OPINIONS BELOW.

The opinion of the Court of Common Pleas is unreported and is printed in the Appendix hereto (*infra*, p. 2a). The majority opinion, on behalf of three of the five Justices of the Supreme Court of Pennsylvania, was filed on August 5, 1964, and is unreported. It is printed in the Appendix hereto (*infra*, p. 11a). One of the three Justices constituting the majority concurred in the result and the other filed a concurring opinion, which is unreported and which is printed in the Appendix hereto (*infra*, p. 23a). A dissenting opinion was filed on behalf of two of the five Justices on August 5, 1964 and is unreported. It is printed in the Appendix hereto (*infra*, p. 30a).

JURISDICTION.

A final order without opinion was entered on July 27, 1964, invalidating 5,624 votes in connection with the primary election on April 28, 1964, for the office of United States Senator in the Commonwealth of Pennsylvania (*infra*, p. 10a). Petitioner filed a Petiton for Reconsideration and/or Reargument on July 28, 1964. On August 5, 1964 the majority filed its opinion in support of its original order of July 27, 1964, in which it affirmed the order of the Court of Common Pleas (*infra*, p. 1a), upon the ground, inter alia, that petitioner "has not been deprived of any right ordained or guaranteed by the Constitution of the United States". The dissenting opinion, filed the same day, August 5, 1964, declares that the majority, in disfranchising the 5,624 voters, violated the Constitutionally protected rights of these voters, particularly Article I, Sections 2, 3, and 4, and the Seventeenth Amendment of the Constitution of the United States.

A Petition for Reconsideration and/or Reargument was filed on July 28, 1964, and an Amended Petition was filed on August 6, 1964, the day following the filing of the

Court's opinion. Said Petition was denied the following morning, August 7, 1964, by an order dated August 6, 1964, and filed August 7, 1964 (*infra*, p. 52a). Said Petition was not circulated among, nor read by, any of the members of the Court. The entry of the order of August 7, 1964, denying the Petition for Reconsideration was in violation of Constitutional due process under the Fourteenth Amendment of the Constitution of the United States. On August 11, 1964, the Court below entered an order (*infra*, p. 54a), holding that the Court, "although divided upon the merits of the appeal is unanimous in its opinion that no useful purpose can be served by either reconsideration of our order of July 27, 1964 or a reargument of the merits of this appeal", and, accordingly, denied said Petition for Reconsideration and/or Reargument.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Involved in this case are Article I, Sections 2, 3, and 4 of the Constitution of the United States and the Seventeenth Amendment to that Constitution, and the Fourteenth Amendment to the Constitution of the United States. Also involved are the following Pennsylvania statutes: Act of June 10, 1893, P. L. 425 and 430, which was superseded by the Election Code of Pennsylvania, Act of June 3, 1937, as amended by the Act of June 8, 1960, 25 Pa. Stat. Ann. §§ 3055 and 3056; Article IX, Section 1111, 25 Pa. Stat. Ann. § 3011(c) which strictly requires the election officials to properly prepare the machines for use, after notice to the political parties; Section 1107, 25 Pa. Stat. Ann. § 3007, which provides that the county board must so prepare the voting machines as to insure the electors' voting in a proper manner; Section 1216(d), 25 Pa. Stat. Ann. § 3056, which provides that the elector shall register his vote by depressing the lever "upon or adjacent to" the name of the candidate.

QUESTION PRESENTED.

Where, in an election for the office of United States Senator, the state statute permitted voting by the levers above or below the names of the candidates, and the Election Board set up the machines to have the vote recorded by the levers above the candidates' names, but left open and failed to block out the levers below the names, over the protest of one of the political parties, with full knowledge that such failure would cause many voters to use the levers below the names rather than those above, and, where, in fact, 5,624 voters actually used the lower levers, and where the intention of these voters was unmistakably clear to vote for the candidates immediately above the levers, since there were no other candidates below or in any other area to which these levers could have been related, does the decision of the Court below, in disfranchising the 5,624 voters, conflict with the requirements of Article I, Sections 2, 3, and 4 and the Seventeenth Amendment of the Constitution of the United States, requiring that every vote which is cast be counted where the intention of the voter can be ascertained?

STATEMENT OF THE CASE.

The primary election for the office of United States Senator in the Commonwealth of Pennsylvania was conducted on April 28, 1964. At the same time, in thirteen wards involved in this controversy in the City of Philadelphia, a special general election was held to fill a vacancy in the Congress. In preparation for the election in the thirteen wards, the County Board of Elections of Philadelphia County prepared the voting machines, and, in accordance with statute requirement in Pennsylvania,[1] communicated with the political party committees and made the machines available for inspection. Immediately

1. 25 Pa. Stat. Ann. § 3011(c).

upon an examination of the machines, the Democratic party committee of Philadelphia entered a vigorous protest against the manner in which the machines were set up. A picture of the voting machine showing the primary and general election candidates is attached to the opinion of the majority below (*infra*, p. 22a).

The Republican primary candidates were set forth in the top row, above which was a channel of levers marked "A". Immediately beneath the Republican row was another channel of levers marked "B", below which was set forth the row of Democratic candidates. Immediately beneath that row was a channel of levers marked "C". Below that channel was a blank row, beneath which was another channel marked "D", below which was another blank row.

The two candidates in the general Congressional election were set under an arrow in a vertical column outside of and to the right of the area reserved for all the candidates in the primary election.

The Election Code in Pennsylvania in prescribing the manner in which voting may be done upon machines provides that the levers which register the vote may be "upon or adjacent to" the candidates' names (25 Pa. Stat. Ann. § 3056). In practice, this has been construed to mean above or below the candidates' names. In Pittsburgh, Pennsylvania, the knobs are placed below the candidates' names. In Philadelphia, the levers are placed above the candidates' names. Thus, a vote may be cast from levers above or below the names in full compliance with the statute.

In this case, in Philadelphia, there being only two rows of candidates for the primary election with the Republican row being on top, when a Republican entered the booth to vote, the channel of levers marked "B" which was below the Republican row but above the Democratic row was locked, leaving only the channel of levers marked "A" above the Republican row open. When a Democrat entered the booth, channel "A" above the Republican row

was locked, leaving channel "B", above the Democratic row, and channel "C" which was beneath it, open. Under the statute therefore, a Democratic voter could register his vote by pulling the lever above or below the Democratic candidates since there were no other candidates to which these levers could apply.

The Democratic City Committee protested because it was obvious that many Democratic voters would use Row "C" unless it was blocked off and locked. There was no statutory prohibition against use of the lower levers. This was dependent upon the set up of the machines by the Election Board. The Election Board, however, failed to issue any instructions to the voters not to use Row "C", and, arbitrarily refused to block off that row because of the cost of $3,000.00. Nor did it affix any instructions on the voting machine itself. The Election Board was thus put on notice, and recognized the probability of Democratic voters voting in Row "C". Its failure to take action under these circumstances was, as all the Courts below found, inexcusable and indefensible! The Election Board by its action had thus set up a trap for the unsuspecting Democratic voters.[2]

The result which the Democratic City Committee warned against became a reality when the voters went to the polls. Five thousand, six hundred twenty-four voters, representing approximately ten per cent of the votes cast in the thirteen wards, pulled the levers in channel "C" below the Democratic candidates' names.[3] The Election

2. It is most significant that in the course of the argument in the common pleas court the judge requested the Solicitor for the Election Board to point to the levers in Row "C", whereupon, this experienced counsel pointed to the levers in Row "D", clearly indicating that he considered the levers in Row "C" as the appropriate ones for the Democratic voters, precisely the same thing which was done by the 5,624 voters (Test. 52-53).

3. The tabulation of the votes cast in Row "C" demonstrates a pattern of voting throughout all of the thirteen wards, giving Blatt a total of 2,094, Roberts 181, and Musmanno 3,349, giving Musmanno a plurality of 1,255 votes. The ratio of this vote, representing ten per

Board thereupon threw out and nullified every one of those votes. Thus, in one fell swoop, the Election Board disfranchised 5,624 voters, notwithstanding the fact that the intention of those voters to vote for the Democratic candidates was clear, and that sole responsibility for the votes in Row "C" rested upon the Election Board.

The Majority Opinion of the Court Below.

The majority of the Court below refused to consider the intention of the voters and nullified all 5,624 votes, castigating the electors for having voted "stupidly", "carelessly", "hurriedly", "absent-mindedly" and "illegally" (*infra*, p. 15a). The majority holds, contrary to the undisputed evidence, that the voting machines were clearly marked and free from error. Having thus found the machines to be free from error the majority thereupon makes the following remarkable finding which is squarely opposed to and inconsistent with the foregoing finding: "If the Election Board had had locked (or blocked off) at a cost of $3,000.00 the blank spaces on Row "C", it would have prevented those controversial votes" (*infra*, p. 14a, fn.).

The majority attempts to minimize the seriousness and magnitude of the vote in Row "C", by saying "Appellant contends that there were nearly 6,000 votes for the Democratic nominee for the United States Senate in 13 wards. Even if this be accurate, when broken down it amounts to less than 12 to a division and less than 7 to each voting machine used in the 13 wards." This attempt to lessen the importance of the grave nature of the matters here involved by reducing the voting figures to voting machine level only emphasizes the superficial attention given by the majority to the momentousness of the startling fact that 5,624 voters have been disfranchised.

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cent of the total vote in the thirteen wards is the same as the ratio of the remaining ninety per cent. The tabulation submitted by the Election Board is attached hereto and marked "Exhibit A".

In refusing to consider the voter's intention, the majority below relied upon an early Pennsylvania state case decided in 1897, *Contested Election of Flynn,* 181 Pa. 457. In adopting the rationale of that decision, the Court below necessarily repudiated and departed from a long line of decisions of its own court, holding to the contrary.

Apart from the fact that the *Flynn* case is distinguishable on its facts, its decision, particularly as construed by the majority below, is in direct conflict with the Constitution of the United States and with the decisions of this Court. Since this petition involves an election for United States Senator, the *Flynn* doctrine must yield to the federal law. The *Flynn* case was decided on the basis of an early Pennsylvania statute, Act of June 10, 1893, P. L. 419, which prescribed the method and manner of voting. That statute has long since been expressly repealed and superseded by the existing Election Code, Act of June 3, 1937, P. L. 1333, art. XII, § 1215, as amended by the Act of January 8, 1960, P. L. (1959), 2143, § 3, 25 P. S. § 3055. The decisions construing the Election Code give the intention of the voter paramount consideration in determining the validity of the vote. In adopting the rule of the *Flynn* case, the majority came into conflict with the federal decisions, as well as with the Pennsylvania state decisions.

In nullifying the 5,624 votes cast in Row "C", the majority disclaimed responsibility for this disfranchisement, stating that the electors disfranchised themselves by voting stupidly, absent-mindedly, etc. Neither these derogatory remarks, nor the conclusion of the court, is justified. The fact is that the Court did disfranchise these voters without legal or moral reason.

Concerned about the impact of its decision on the federal law since the election involved a United States Senator, the majority below nakedly declared, without discussion, that the disfranchisement of the 5,624 voters "did not deprive these voters of any right ordained or guaranteed by the Constitution of the United States." This

conclusion is likewise insupportable in law. Indeed, the decisions of this Court are directly to the contrary, as will hereinafter appear.

The Dissenting Opinion of the Court Below.

The dissenting opinion of Mr. Justice Jones, joined in by Mr. Justice O'Brien, notes first of all that in discussing the facts the majority deals in "sheer speculation"; that the majority committed basic error in failing to consider the intention of the voters; that the majority violated the principle that the courts cannot act on conjecture in nullifying the right of suffrage; that the majority erred in failing to resolve all doubts in favor of the validity of the vote.

The dissenting opinion fully recognizes the importance and significance of the voters' intention in determining the validity of the ballot, and states as follows:

> "The fallacy of the majority's position in this respect is self-evident: its complete rejection of the factual data on this record. What is even more astounding is the clear implication in the majority opinion that, even if the voters' *intent* were ascertained, such intent would not be recognized because voters, in the manner of their voting, failed to comply with the letter of the election statute!!" (Emphasis supplied.)

In condemning the Elections Board for its carelessness and irresponsible conduct, the dissenting opinion, in quoting from a landmark Pennsylvania decision, declared:

> " 'If we, by our decision, should permit the carelessness . . . of [election] officers . . . to defeat the election . . . , we would thus make the people suffer for an act in which they did not participate, and which they did not sanction.' "

Since the majority relied principally on the *Flynn* case,[5] decided in 1897, Mr. Justice Jones traces the development of the election laws, showing that the facts in the *Flynn* case are entirely different from those at bar but in any event that decision could have no application under the present law, since it was decided under a statute and principles of law which have long since been superseded. The opinion notes that until the passage of the voting machine law (Act of April 18, 1929, P. L. 549), all voting was by paper ballot and the pre 1929 statutory law referred only to voting by such method, and designated the precise manner and place where voting was required to be done. The pertinent sections of the Act of 1893 were repealed by the Election Code[6] (completely overlooked by the majority opinion). Section 1215(b) of that Act changes the manner of voting on paper ballots and relaxes the rigidity previously exacted. More importantly, the Legislature made different provision for voting on machines than is applicable to paper ballots, giving more liberality to ascertaining the voters' intent, where votes are cast on machines.

The dissenting opinion also gives specific consideration to that part of the Election Code, 25 Pa. Stat. Ann. 3056(d) which provides that the elector may vote by operating the lever "upon or adjacent to" which the name of the candidate is placed, *thereby demonstrating that the voters in this case were in full conformity with the requirements of the statute by operating the lever beneath the name rather than the one above the name.*

In dealing with the effect of the voters' intent, the dissenting opinion notes that until the passage of the 1919 statute in Pennsylvania, the courts leaned toward a rigid rule which rendered invalid any vote not cast in a strict and literal compliance with the statute and regardless of

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5. *Contested Election of Flynn,* 181 Pa. 457 (1897).

6. The Act of June 3, 1937, P. L. 1333, art. xii, § 1215, as amended by the Act of January 8, 1960, P. L. (1959), 2143, § 3, 25 Pa. Stat. Ann. § 3055.

whether the intent of the voter could be ascertained; that since the passage of the 1919 statute, the Pennsylvania Supreme Court followed the rule, consistent with the federal policy, giving liberal recognition and weight to the intent of the voter once ascertained, citing *Knight v. Coudersport Borough,* 246 Pa. 284; and that since that time, the dissent points out, the voters' intent has become the paramount consideration in determining the validity of the vote, even though there may be technical non-compliance with the statute.

In concluding, Mr. Justice Jones notes the conflict of the majority decision with the provision of the federal Constitution (p. 25):

> "The right to vote for United States Senator is protected and guaranteed by the Constitution of the United States (Art. I, Sec. 2 and 3; 17th Amendment). The right to vote obviously carries with it the right to have one's vote counted. In *U. S. v. Classic,* 313 U. S. 299, 314-16, 61 S. Ct. 1031, 85 L. Ed. 1368, the U. S. Supreme Court has recognized as a right 'secured by the Constitution' the right of voters *'to cast their ballots and have them counted'*. As a result of the majority view thousands of voters have been denied this constitutional right. The Supreme Court of the United States in *Gray v. Sanders,* 372 U. S. 368, 380, — L. Ed. —, declared: 'The right to have one's vote counted has the same dignity as the right to put a ballot in a box.' See also *Wesberry v. Sanders,* 376 U. S. 1, 11 L. Ed. 2d 481, 486. A study of the majority opinion does not reveal any sound, let alone *compelling,* reason for the denial of this right."

Petitioner herein seeks review and reversal because of the conflict between the decision of the majority below and the Constitution of the United States, and the decisions of this Court.

REASONS FOR GRANTING THE WRIT.

I. In Disfranchising 5,624 Voters in a Primary Election for Allegedly Voting in the Wrong Place, the Court Below Refused to Consider the Clear Intention of the Voters, Contrary to the Requirements of the Constitution of the United States, to the Many Decisions of This Court, Including *Wesberry v. Sanders*, 376 U. S. 1, 11 L. Ed. 2d 481; *United States v. Classic*, 313 U. S. 299; *Gray v. Sanders*, 372 U. S. 368, 9 L. Ed. 821; *Ex parte Siebold*, 100 U. S. 371; and *Ex parte Yarbrough*, 110 U. S. 651, and Contrary to the Decision of the Court of Appeals for the First Circuit in *National Labor Relations Board v. Whitinsville Spinning Ring Co.*, 199 F. 2d 585.

In affirming the action of the County Board of Elections in this case, the decision of the Court below collided head on with the United States Constitution and with decisions of the federal courts setting the standards in these cases. It deprived 5,624 United States citizens of their constitutionally guaranteed right to participate in a federal election.

At the very outset it may be noted that while elections for Congressional offices are regulated and conducted by the various states, the right to vote in these elections stems not from the state law, but originates in the Constitution of the United States and is judicially protected by the provisions of that instrument. *Ex parte Yarbrough*, 110 U. S. 651; *Wiley v. Sinkler*, 179 U. S. 58; *Ex parte Siebold*, 100 U. S. 371; *Smith v. Allwright*, 321 U. S. 649; *United States v. Classic*, 313 U. S. 299; *Swafford v. Templeton*, 185 U. S. 487. In *Wiley v. Sinkler, supra*, Mr. Justice Gray stated the origin of the right as follows:

> "The right to vote for members of the Congress of the United States is not derived merely from the

Constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." (179 U. S. at 62)

Nor may any distinction be made on the ground that a primary election is here involved rather than a general election. *United States v. Classic*, 313 U. S. 299.

The right of suffrage is without doubt one of the most precious possessions of every American citizen. It stands as the foundation stone of democracy and it is protected against all forms of invasion which might impair or destroy the right by the Constitution of the United States. The Supreme Court of the United States has, by a series of decisions, insured against any interference with the right and has guaranteed its preservation against all forms of encroachments—to the end that the *will* or *intention* of the majority be given full expression. Anything less would destroy the democracy.

Basic and implicit to the right to vote is that the will or intention of the voter be given full effect so that the will or intent of the majority may govern the whole. This can only be ascertained by the cumulation of the intents of the individual voters. Pursuant to that objective, the Supreme Court has barred conduct designed to "stuff" or "loot" the ballot boxes because this would dilute the vote and defeat the will or intent of the majority; the same is true with respect to altering the ballots and other means of ballot tampering. *Wesberry v. Sanders*, 376 U. S. 1, 11 L. Ed. 2d 481 (1964). This Court goes to the limit in insuring against diluting the vote on an individual basis or on a group basis. The objective is the same in all cases: protection of the will and intent of the individual voters who, collectively, determine the intent or will of the majority, which, in turn, governs the democracy.

The decisions of the Supreme Court of the United States, in the protection of the voters' rights to insure against encroachments on the voters' will and intent, have

enjoined not only the state governments, but also the individuals whose actions violate the federal standards in any Congressional election. In *United States v. Classic, supra,* the Court sustained an indictment against state employees for willfuly altering and falsely counting and certifying ballots cast in a primary Congressional election for Representative in Congress. In *Ex parte Yarbrough, supra,* an indictment was sustained against state officials who conspired to prevent citizens from voting in a Congressional election. It is no less an offense to set up voting machinery which leads to a disfranchisement of the vote than it is to engage in other forms of illicit activity to prevent the vote or otherwise negate it. In *United States v. Mosley,* 238 U. S. 383, the Supreme Court sustained an indictment against state officials who had conspired to alter the election returns and omit votes from the count. This is the same as dipping the hand into ballot boxes, and it differs in no material respect from disfranchising voters by the manner in which a voting machine is set. In *Gray v. Sanders,* 372 U. S. 368, the Supreme Court struck down the state's county unit system in a senatorial election as a basis for counting the votes on the ground that the Equal Protection Clause required every voter to be "equal to every other voter when he casts his ballot". The voters who cast their ballots in Row "C" in the instant case were equal to every other voter who cast their ballots in Row "B". In *Ex parte Siebold, supra,* state election officials were convicted of interfering with a Congressional election by preventing a supervisor of elections from performing his duties, by "stuffing the ballot box" and by perpetrating other illegal activities. In defense of the culprits, it was argued that the Federal Government had no power to enforce state laws to punish state officials. The Supreme Court of the United States, rejecting this contention, said the reach of the federal arm extends as far as is necessary to protect the voters and to restrain and punish those who would interfere with the right. Said the Court, at 723:

"It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State Government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, state and national. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a Representative owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot box cannot be made amenable to the United States."

It was no less an offense for the election officials in the case at bar to set up the voting machines either by design or neglect in a manner as to cause certain of the electors to vote on Row "C" and then forfeit those votes.

Emerging from the foregoing and many other related decisions, came the doctrine of "One person, one vote", in support of the principle that every elector's vote must be given the fullest effect and placed on an equal basis with every other vote. Mr. Justice Douglas said in *Gray v. Sanders, supra:*

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nine-

teenth Amendments can mean only one thing—*one person, one vote.*" (372 U. S. at 830-31) (Emphasis supplied.)

Another principle invoked by the Supreme Court to strengthen and further protect and give full value to the electors' exercise of vote was expressed by Mr. Justice Holmes in *United States v. Mosley, supra,* where the election officials were charged with failing to count certain of the votes, in these terms:

> "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." (238 U. S. at 386)

This latter doctrine served to rebuff all those devious efforts directed to invalidating the votes once cast. This pronouncement of the court effectively strikes down all such activities. Mr. Justice Roberts, in *United States v. Saylor,* 322 U. S. 385, held that the refusal to count the vote differed in no respect from keeping the voter out of the polling place, stating:

> "The conclusion was that § 19 protected personal rights of a citizen including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted." (322 U. S. at 387-88)

To the same effect is *Gray v. Sanders, supra,* where the Supreme Court held:

> "The Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted at Con-

> gressional elections.' . . . Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in United States v. Mosley, 238 U. S. 383, 386, 59 L. ed. 1355, 1357, 35 S. Ct. 904, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' " (372 U. S. at 380). (Citations omitted.)

The depth, width and breadth of the protection of the doctrine giving the fullest value to the will and intent of the voter is no better illustrated than in the decision in *Wesberry v. Sanders,* 376 U. S. 1, 11 L. Ed. 2d 481 (1964), where the issue involved the apportionment of votes in Congressional districts. The decision embraces within it not only the right to vote, the right to have the vote counted and the right to have full effect given to the will and intent of the voter, but it extends even further, holding that such rights may not be impaired by reason of the disproportion of the voters in the districts. Mr. Justice Black, speaking for the Court, said:

> "We hold that, construed in its historical context, the command of Art. I, §2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (11 L. Ed. 2d at 486-87)

After a review of the history, Mr. Justice Black further observed, at 492:

> "It is in the light of such history that we must construe Art. I, § 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen 'by the People of the several States' and shall be 'apportioned among the several States . . . according to their respective numbers.' It is not surprising that

> our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted."

The Court thereupon makes it crystal clear that the right to vote may not be impaired in any manner, stating, at 492:

> "Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, see United States v. Classic, 313 U. S. 299, 85 L. ed. 1368, 61 S. Ct. 1031, or diluted by stuffing of the ballot box, see United States v. Saylor, 322 U. S. 385, 88 L. ed. 1341, 64 S. Ct. 1101. No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

The action of the Board of Elections and the decision of the majority below in the instant case come into direct conflict with the foregoing most recent pronouncement of the Supreme Court. It would seem conclusively clear that under no circumstances could the 5,624 voters be disfranchised by the entrapment of the Election Board as was done in this case. At most, if, in another context, the voters' intention could not be ascertained, because of a faultily prepared voting machine, a new election would necessarily be in order, but not disfranchisement. In view, however, of the unmistakably clear intention of the voters, the mandate of the United States Supreme Court's decisions required the votes to be counted.

The majority below, in disfranchising the thousands of voters, derogatorily placed the reason for that action on alleged personal characteristics—with not a scintilla of evidence in support—declaring that they had voted "stupidly", "hurriedly", "absent-mindedly" and "protestingly". This finding, which is wholly foreign to the

enlightened principles long espoused by this Supreme Court. In the *Wesberry* case, Mr. Justice Black laid down the rule in sharp contrast to the harsh and foreign doctrine of the Court below, in quoting from Madison, as follows:

> "'Who are to be the electors of the Foederal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. . . .'
>
> "Readers surely could have fairly taken this to mean, 'one person, one vote.' Cf. Gray v. Sanders, 372 U. S. 368, 381, 9 L. ed. 2d 821, 831, 83 S. Ct. 801." (11 L. Ed. 2d at 492)

It is thus clear that the Court below, in disfranchising the thousands of voters because of an alleged irregularity, committed the most basic and fundamental error, not only in refusing to give heed to the intention of the voters, but in testing the vote based on station in life and education. There has never been any place in American jurisprudence for such distinctions.

The doctrine of the Court below conflicts not only with the long-established and firm principles in the election laws, but it is likewise refuted by the same principles which have been consistently applied in all litigations involving public, and even private, operations. In *National Labor Relations Board v. Whitinsville Spinning Ring Co.*, 199 F. 2d 585, the labor board disfranchised a voter in a secret election because of an erasure on the ballot and refused, as the Court below did here, to give consideration to the intention of the voter. The Court of Appeals for the First Circuit reversed, holding that the board committed fatal error in failing to consider the intention of the voter. In declaring that the same rule which applied in political elections ap-

plied also in the labor board elections, the court of appeals stated:

> "The only purpose of any election, *be it a political election* or one conducted by the Board to determine a bargaining representative, *is to discover the intent* of the qualified electors *to the end that effect may be given to the will of the majority.*" (199 F. 2d ta 587) (Emphasis supplied.)

In analyzing the problem as it related to the intention of the voter, the Court said further.

> "'. . . the Board, instead of following its usual practice in this situation of looking for the voter's intent, did not reach the question of intent at all, because it accorded controlling and conclusive significance to the single fact that an attempted erasure appeared on the ballot. We must confess that we can find no logical reason why the Board should single out an erasure, or an attempt at erasure, on a ballot for special treatment by considering all such ballots necessarily mutilated and therefore void. Moreover, it seems to us only fair that a voter should be apprised of such an extraordinary rule. While the statement printed on the ballot directed the voter to obtain a new ballot if he 'spoiled' the original one, the word 'spoiled' was in no way defined, and it is difficult for us to say that the average voter would consider a ballot 'spoiled' merely because it contained a slight erasure. If departure from orthodoxy in marking ballots is to be countenanced by the Board at all, as it clearly is from the decisions cited above, then, in the absence of any question of voter identification, the problem is, as the Board has repeatedly held, to discover if possible the voter's intent. In view of this policy we feel forced to the conclusion that there is no logical reason for holding that an erasure, or an attempted one, on a ballot for that reason alone automatically mutilates a ballot and renders it void.

It therefore seems to us that the ballot here under consideration ought to be counted *if the intention of the voter can be determined therefrom with reasonable certainty.*" (199 F. 2d at 588) (Emphasis supplied.)

In reversing, the Court concluded:

> "Ordinarily this question of voter intention is for the Board, so in the present situation we would ordinarily remand to the Board for a determination of that question. But an inspection of photostatic reproductions of the disputed ballot and of the actual ballot itself leaves us with the firm conviction that the intention of the voter to vote 'No' is so abundantly clear that we may as well say so now in the interest of terminating this proceeding without further unnecessary delay." (199 F. 2d at 588-59)

The doctrine requiring effect to be given to the voters' intention has received the widest application in litigation of private, as well as public, matters. In *Pacific American Fisheries v. Gronn*, 103 F. Supp. 405 (1952), where in an election for the selection of directors certain of the votes were rejected because they were allegedly improperly cast and the officers refused to consider the voters' intention, the Court reversed, stating, "It is well settled that the intent of the voter when ascertainable must be given effect."

Other state jurisdictions consistently follow the same rule. In *Thompson v. Boling*, 240 Ky. 340, 42 S. W. 2d 321 (1931), in a situation far more difficult than the one at bar, where a paper ballot was involved and the voter marked his ballot below and to the side of the candidate's name, the court found that notwithstanding the irregularity in the voting, the voter's intention was clear and the vote was counted. Said the Court:

> "It is a general rule that when it is clear that the voter has made an honest effort to conform to the direc-

tions of the statute as to the manner of voting, although with imperfect results, the ballot should be counted if the intention of the voter can be effectuated.

* * *

"It is not enough that some possibility defeating the evident purpose of the voter can be conjectured. The rule requires only reasonable probability, and that which was probably intended cannot be said to be impossible of ascertainment. . . .

* * *

"It is reasonable to presume that the voter intended to vote for some one, and when he did not register his choice with precision it is a just inference, in the absence of anything further to show his intent, that he intended to vote for the name nearest his mark. . . ." (S. W. 2d at 322)

The late Judge Lehman, speaking for the New York Court of Appeals in *Matter of Creedon*, 264 N. Y. 40 (1934), said:

"*The statute gives the courts no power to disfranchise a single voter and certainly no power to disfranchise the voters of whole election districts.* They must determine from the evidence presented the number of votes cast for the candidates. *They cannot act on conjecture, but, as in all other matters presented to them, they may act on logical inferences based on human probabilities.*" (Emphasis supplied.)

The texts are to the same effect. Paine on Elections, § 595 states:

"An election will not be invalidated by mere neglect or irregularity, on the part of the officers, in making up the returns if the will of the voters, legally expressed, can be ascertained with certainty."

Nor, prior to the decision of the majority below in this case, was the rule any different in Pennsylvania. As the dissenting opinion in this case points out, since the passage of the 1919 Pennsylvania statute, the Pennsylvania courts have given recognition to the intent of the voter once ascertained. *Knight v. Coudersport Borough*, 246 Pa. 284; *Fish's Election*, 273 Pa. 410; *Gegg's Election*, 281 Pa. 155; *Norwood Election Contest Case*, 382 Pa. 547, where the Pennsylvania Supreme Court significantly stated, "Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." In *McCracken Appeal*, 370 Pa. 562, the court said, "In any disputed election nothing can be more vital towards the accomplishment of an honest and just election than the ascertainment of the intention of the voter." See also *James Appeal*, 377 Pa. 405, where the court said, "In the sphere of public elections which, after all, constitute the very warp and woof of democracy, nothing can be more vital in the accomplishment of an honest and just election than the ascertainment of the intention of the voter."; *Reading Election Recount Case*, 410 Pa. 62, where the court held if, from the ballot cast, the intent of the voter in his choice for a candidate for office can be ascertained, then such ascertained intent must be granted full recognition and the ballot counted, even though there be a technical non-compliance with the election statute.

The majority decision of the Court below reverses the long line of enlightened Pennsylvania decisions and turns the clock back to the previous century. Whatever might be the effect of that decision insofar as local election contests are concerned, it cannot possibly have any application in the instant case, being in direct conflict with the federal decisions.

The majority below speculated without any support in the record that it was possible for a Republican to vote on Row "C". First of all, this would have been impossible because as soon as the Republican pulled the lever of his

choice in the Republican row, he automatically thereby locked all the other levers for that office, including Rows "B" and "C". To impute an intention to a Republican to vote in a Democratic primary moreover is to impute an unlawful intention which is forbidden by strong presumption in the law, as the dissenting opinion so clearly points out. As the court said in *Simon Election Case,* 353 Pa. 514:

> "Where acts are of an official nature . . . a presumption arises in favor of their due execution. . . . It is a maxim of the law . . . to presume that what has been done was done of right, and not of wrong. The law will presume in favor of honesty and against fraud (citing cases) Broom's Legal Maxims' 10th edition, p. 640 et seq."

In *Winlack v. Geist,* 107 Pa. 297, 301, the Supreme Court of Pennsylvania said:

> "When a man does an act, the presumption in absence of evidence otherwise is that he acted rightfully and not wrongfully."

See also *Wilkes-Barre & E. R. R.,* 311 Pa. 510, 514; *Waters v. New Amsterdam Cas. Co.,* 393 Pa. 247, 254; *Horan v. Weiler & Ellis,* 41 Pa. 470. In *Silverman v. Rumbarger,* 4 Pa. Super. 439, 442, the Court stated:

> "It is a presumption of law that everyone has conformed to the law, and the burden is upon who alleges the contrary: (19 Am. & Eng. Ency. of Law, 42.)"

There is not a shred of evidence in this record to show that the Republican voters crossed over to vote in Row "C".

The statements of the majority that the word "Republican" in the special election was opposite the channel of levers marked "C" is incorrect. An examination of

the picture attached to the opinion below shows the word Republican well below the entire channel "C" levers. That channel was immediately below the names of the Democratic candidates, and no other candidates were below that channel.

Involved in this petition are three candidates for the office of United States Senator in the primary election of April 28, 1964, Blatt, Roberts and Musmanno. The record establishes that when the Democratic voters entered the booth, the channels of levers above and below these three names were all open. There were no instructions on the machines. The Election Board was fully aware of the probability that Democratic voters would vote the lower rather than the upper levers. The intention of the thousands of voters who used Row "C" was unmistakably clear to vote for Blatt, Roberts or Musmanno, depending upon which name was above the lever pulled. As the court said, in *Reading Election Recount Case,* 410 Pa. 62 (1963):

> "'*Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will* in substantial conformity to statutory requirements.'" (Emphasis supplied.)

The instant case satisfied all of these criteria. The statutory requirements permitted voting below the name, as is done in Pittsburgh, Pennsylvania, or adjacent to the name in the Philadelphia area.[7] Here, by leaving the levers open above and below the name, the Board of Elections, in effect, invited the voters to use either the upper or the lower levers. Of course, when one of the levers is depressed, it locks the entire area to preclude more than one vote by the same elector.

In setting up the machines without any instructions, the Election Board, by now invalidating the votes cast upon

7. The so-called Jamestown machines in this case placed the lever above the nominee's name, while the Shoup machines placed the lever to the side of the candidate's name.

the lower levers, effectively entrapped all those thousands of voters who pulled the lower levers.[8]

It is incredible that the Board of Elections, being solely responsible for the condition, should refuse to count the votes cast on Row "C", when the intention to vote for the candidates immediately above the levers was so unmistakably clear. An examination of the photograph attached to the opinion of the Court below quickly demonstrates the point. As will be observed, there are no other candidates below or in any other area to which the levers in Row "C" could be related other than the candidates immediately above each lever; namely, Blatt, Roberts and Musmanno.

The decision of the Court below conflicts with the established principles of this Court and other federal courts and, if permitted to stand, will result in countless abuses of the election machinery, not only in the forthcoming general election in November, but in all succeeding elections, unless this Court grants the Petition for Writ of Certiorari and reverses the decision of the majority below. The disfranchisement of the 5,624 voters cries out for immediate summary reversal, in accordance with the established principles of this Court.

The issue here involves the nomination of a United States Senator who must be placed on the ballot for the general elections scheduled to take place on November 3, 1964. Many and extensive preparations are required to be

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8. The majority opinion refers to a sample ballot which was, in itself, most confusing since it did not portray the channels of levers at all and showed individual levers inside the squares with each candidate's name, thus creating confusion in the mind of any voter who examined the sample ballot and entered the voting booth to find an entirely different set up. Nor were the small model voting machines of any assistance because they showed only Rows "A" and "B" and did not have Rows "C" and "D", as did the actual voting machines. Moreover, the Board of Elections' representatives were unable to state that these were furnished to the voting places in question or that they were ever displayed.

made well in advance of the election date, in order that the candidate may stand for election as scheduled.

Since this Court is not in session at the present time and will not resume its sessions until October 5, 1964, petitioner respectfully prays Your Honorable Court to give consideration to this matter on the Petition and Answer at the earliest possible moment, and to schedule a special session in advance of the opening of the fall session of this Court.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted and the decision of the Court below be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Attorney for Petitioner.

EXHIBIT A.

Row C Tabulations—Jamestown Voting Machines

Ward	*Blatt*	*Roberts*	*Musmanno*
23	231	18	317
25	131	13	241
33	271	21	601
35	111	6	95
36	98	10	431
41	252	28	348
45	107	9	172
53	103	10	148
54	176	11	261
55	162	14	197
56	161	12	202
57	160	12	182
58	131	17	154
Totals	2094	181	3349

Column C Tabulations—Shoup Voting Machines

Ward	*Blatt*	*Roberts*	*Musmanno*
43	24	7	14
49	37	9	23
Totals	61	16	37

Appendix.

IN THE COURT OF COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY.

March Term, 1964. No. 5446.

IN RE: PETITION TO CANVASS ROW "C" ON THE VOTING MACHINES IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58, ON BEHALF OF ALL DEMOCRATIC CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION.

DECREE.

AND Now, to wit, this 8th day of June, A. D. 1964, after hearing and argument on June 4, 1964, the appeal is dismissed. The order of the Philadelphia County Board of Elections refusing to include the tabulation of figures on Row "C" as votes in the official primary count is affirmed.

By THE COURT:

VINCENT A. CARROLL,
Vincent A. Carroll, P. J.

IN THE COURT OF COMMON PLEAS No. 2 OF PHILADELPHIA COUNTY.

March Term, 1964. No. 5446.

IN RE: PETITION TO CANVASS ROW "C" ON THE VOTING MACHINES IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58, ON BEHALF OF ALL DEMOCRATIC CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION.

OPINION.

June 8th, 1964.

CARROLL, *P. J.*

ROBERT J. BRAY, JR., ESQ., GREGORY M. HARVEY, ESQ., Attorney for Candidate Genevieve Blatt.

LEVY ANDERSON, ESQ., First Deputy City Solicitor; EDWARD G. BAUER, JR., ESQ., City Solicitor, Attorneys for County Board of Elections.

ABRAHAM E. FREEDMAN, ESQ., BENJAMIN R. DONOLOW, ESQ., MARTIN J. VIGDERMAN, ESQ., Attorneys for Democratic County Committee.

This matter before the Court is an appeal by the Democratic County Committee from an order of the Philadelphia County Board of Elections refusing to include in the official count certain alleged votes recorded in blank spaces in the third row of certain of the voting machines utilized in the Primary Election of April 28, 1964.

All parties to this appeal agree that on the Jamestown machine utilized in all but two of the wards conducting a special congressional election, the names of the candidates

and levers were arranged in horizontal rows with levers appearing directly over the name. The vote was cast by depressing the lever across the card indicating the candidate's name. The rows were arranged as follows:

Row "A"—REPUBLICAN (listed the candidates for Republican primary nomination)

Row "B"—DEMOCRATIC (listed the candidates for Democratic primary nomination)

Row "C"—SPECIAL ELECTION

REPUBLICAN (no candidates' names were listed on this row except at the extreme right end thereof where the names of the Republican candidates in the special general elections appeared)

Row "D"—SPECIAL ELECTION

DEMOCRATIC (no candidates' names were listed on this row except at the extreme right end thereof where the names of the Democratic candidates in the special general elections appeared)

On the Shoup machine utilized in the 43rd and 49th Wards where a special general election was also held, the arrangement was identical with the Jamestown machine except that the rows were vertical columns designated I, II, III and IV respectively. The only other distinctive feature of the Shoup machine is that an "x" appears next to the candidate's name, if any, when the voting lever is depressed.

There being no distinction of substance between Row "C" of the Jamestown machine and Column III of the Shoup machine, all future discussion in this Opinion relating to the votes allegedly cast in Row "C" of the Jamestown machine will be equally applicable to the votes allegedly cast in Column III of the Shoup machine.

The County Board of Elections did not block the levers on the blank spaces in the "C" and "D" rows. Thus, the levers in these rows could be depressed in spite of the fact that no candidates' names in the primary election appeared on these rows. Because of this fact it was thought that many voters in attempting to vote for the democratic candidates whose names appeared on Row "B" inadvertently depressed the lever beneath the candidate's name, thus causing an alleged vote to be recorded in Row "C".

The Democratic County Committee filed its petition with the County Board of Elections on behalf of all of its endorsed candidates to have the alleged votes appearing on Row "C" counted as votes for the democratic candidate whose name appeared above this row. This petition was denied from which this appeal was taken.[1]

Appellee Genevieve Blatt, one of the candidates for the Democratic United States senatorial nomination, asks that the rule of the County Board of Elections be affirmed. The County Board of Elections was represented and heard at the hearing and argument by the City Solicitor and has filed a brief.

It should be emphasized at the outset that while all parties to this appeal place great emphasis on the close contest for the democratic senatorial nomination between Genevieve Blatt and Michael Musmanno, the sole duty of this Court is to determine the validity of the alleged votes appearing on the third row of the voting machines utilized in the wards conducting the special election. What effect such a determination might have in the Democratic pri-

1. The parties agree that while some alleged votes were cast in the fourth row "D", these are not at issue.

mary senatorial election or any other election is completely immaterial to this inquiry.

All parties have agreed upon the basic facts. Thus, it is agreed that registered Republicans voting in the primary election could vote on Row "A" but not on Row "B" as this row was locked immediately upon the voter declaring his party registration and before his entry into the voting booth. Conversely, registered Democrats voting in the primary election could vote on Row "B" but not on Row "A".

It is likewise agreed that irrespective of party and non-partisan registration, any voter entering the booth could depress the levers in Rows "C" and "D" because of the special election in the wards in question, but that each voter could vote only once in the United States senatorial primary.[2] Thus, if a registered Republican voted for a senatorial candidate in Row "A", his action locked all the other levers for the same office in the same or any other row, including the senatorial blank space of Row "C" and Row "D". This likewise applies to a registered democratic vote for United States Senator.

The right to vote is the highest privilege of a citizen in a democracy. It is in fact that which distinguishes a democracy such as the United States of America from all other forms of government. The democratic form of government is an expression of the popular will as evidenced by the electorate. To insure an accurate expression of the popular will, the voting mechanism must be regulated and a voter, by failing to substantially comply with such regulation disfranchises himself. Thus, a judicial pronouncement that a particular voter has not complied with the regulations does not disfranchise the voter, rather the voter by failing to observe the regulations has rendered his vote a nullity.

The Election Code provides with respect to voters at primary elections as follows: (1937, June 3, P. L. 1333, art. XII, § 1216(d). 25 Purdon's Stat. § 3056(d)):

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2. Or for any other office for which one nominee was to be elected.

> "(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed."

This section we believe expresses the clear legislative intent that an elector, to have his vote counted for the candidate of his choice, must do so by operating "the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed."

There is no warrant for deviation permitted, such as by depressing the lever in a different row even though the row be beneath or adjacent to the candidate for office.

The law of Pennsylvania is clear that when an elector fails to properly indicate his choice, his attempted vote is void. This principle was firmly established by the Pennsylvania Supreme Court in *In re Contested Election of John J. Flynn,* 181 Pa. 457 (1897). In that case certain electors improperly marked their paper ballots with one of the voters indicating his choice by placing an "x" in a box adjacent to a blank space and beneath the name of a candidate. The Court held that the ballots in question must be disallowed. In reaching this decision, the Court stated (p. 460): "The presumption is that the voter knows where and how to mark his ballot"; further that neither our courts nor our election officers are permitted to surmise the intention of the voters, and an elector's non-compliance with proper voting procedure is inexcusable. It should be noted that the Pennsylvania Court was not alone in adopting such a position. *O'Connell v. Mathews,* 177 Mass. 518, 59 N. E. 195 (1901); *Flanders v. Roberts,* 182 Mass. 524, 65 N. E. 902 (1903); contra *Thompson v. Boling,* 42 S. W. 2d, 321 (1931).

The appellant has attempted to distinguish the *Flynn* case on the basis it dealt with paper ballots rather than voting machines. This distinction is meaningless; it would be most illogical to disallow a vote in a blank space on a

paper ballot, yet allow the same type of vote to be counted when cast on a voting machine. The Pennsylvania Constitution prohibits any such distinction by virtue of its requirement that uniformity be observed within all laws regulating elections. ARTICLE VIII, Section 7. No distinction can be made in the principles governing the validity of a vote solely on the difference between a voting machine and a paper ballot. *Parente Appeal*, 390 Pa. 231 (1957). That the *Flynn* case rationale must be made applicable to voting machines is well illustrated by a recent Supreme Court decision. *Weber Appeal*, 399 Pa. 37 (1960). In that case electors improperly affixed stickers indicating their choice of a write-in candidate. The Court drew the analogy vis-a-vis write-in votes on paper ballots and machines, and disallowed the votes in question because they were misplaced on the machine. Thus, it is clear that an elector's failure to properly indicate his choice renders his vote a nullity regardless of the method used to cast the vote.

We are aware that not every technical violation of election laws by an elector is sufficient to invalidate his vote. Thus, where a voter properly indicates his choice on a ballot, he makes an effective vote despite the presence of marks in the nature of surplusage on his ballot. *Reading Election Recount Case*, 410 Pa. 62 (1963); *Norwood Election Contest Case*, 382 Pa. 547 (1955); *Bauman Election Contest Case*, 351 Pa. 451 (1945). Where a voter clearly indicates his vote for a write-in candidate, it is valid even though there is a variance with the actual name of the candidate. *McCracken Appeal*, 370 Pa. 562 (1952). *Harer's Petition*, 49 D. & C. 344 (1943). Where a voter properly indicates his choice of candidates on a voting machine, his vote is valid, regardless of the fact that the machine is defective and does not properly record his vote. *Miraglia Appeal*, 1 D. & C. 2d, 717 (1954); also see *In re Creedon*, 264 N. Y. 40, 189 N. E. 773 (1934); *McGallagher v. Bosarge*, 136 So. 2d 181 (1961). However, in each of these cases the elector clearly indicated the choice of his vote. Thus these Courts

were not confronted with the fundamental question; namely, what is the effect of an attempted vote in a blank space? This is a question of substance, not form.

The *Flynn* case conclusively establishes the answer to this question. We cannot surmise what the elector intended when he depressed the lever on a blank space on the "C" row. We must presume that the voter knew where and how to vote. In this connection it should be noted that sheets diagramming the voting machine are provided at each polling place. Further, accompanying each voting machine is a small replica model which is provided for the voter's edification. Therefore, we must conclude, as did the Court in the *Flynn* case, that the elector's depressing of a lever on a blank space in Row "C" constitutes inexcusable noncompliance with voting procedures on the part of the elector.

Our determination of the applicability of the *Flynn* principle to voting machine cases is supported not only in this jurisdiction (*In re Election in Third District of Ransom Township,* 38 D. & C. 609 (1940)), but also by the New York Courts. *In re Cosgrove,* 267 App. Div. 822, 46 N. Y. S. 2d 195 (1944); *Application of Lester,* 205 Misc. 67, 127 N. Y. S. 2d 272 (1953).

It is urged that the complexity of the voting machine caused all those "voting" on Row "C" to become confused in an identical manner. We cannot accept the conclusion that every voter committed the same mistake and pulled the lever below the name of the candidate of his choice. There are too many other possibilities. The parties agreed that it was possible that a registered Republican or Non-Partisan could have voted on Row "C" as well as a registered Democrat. Thus, there is a probability that electors other than registered Democrats voted on Row "C".[3] Even if

3. The attorneys for Genevieve Blatt offered testimony of eminent professors of mathematical psychology whose qualifications are unquestionable. This testimony was received subject to appellant's motion to strike. After hearing testimony of one of the professors, Robert Duncan Luce, the Court granted the appellant's motion. This testimony has no bearing on our determination of the issue before us.

only registered Democrats attempted to vote Row "C" there is no way to determine their intention in depressing the lever on Row "C". The elector might have intended a protest vote by depressing the lever on a blank space, or perhaps he was so confused he had no idea for which he was attempting to vote. Also, it is interesting to note that some electors even attempted to vote in the blank spaces on Row "D".

In any event the question of determining the intent of the elector is secondary to the basic issue of whether the elector actually cast a vote. There is no doubt under the law of this Commonwealth that an attempted vote in a blank space is a nullity. Thus, any figures compiled from the blank spaces on Row "C" cannot be counted as votes for any candidates.

Accordingly, we have dismissed the appeal and affirmed the order of the Philadelphia County Board of Elections.

By THE COURT:

VINCENT A. CARROLL, *P. J.*

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 329. January Term, 1964.

IN RE: PETITION OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA ON BEHALF OF ALL ITS ENDORSED CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58.

APPEAL OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA.

APPEAL FROM ORDER OF COURT OF COMMON PLEAS No. 2 OF PHILADELPHIA COUNTY, MARCH TERM, 1964, No. 5446.

ORDER.

FILED: July 27, 1964.

The Order of the lower Court—which affirmed the unanimous decision of the Board of Elections which held that votes in a so-called blank row were invalid and void—is affirmed. Opinions to be filed later.

THE COURT,

/s/ JOHN C. BELL, JR.,
Chief Justice.

Mr. Justice Jones and Mr. Justice O'Brien dissent.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 329. January Term, 1964.

IN RE: PETITION OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA ON BEHALF OF ALL ITS ENDORSED CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58.

APPEAL OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA.

APPEAL FROM ORDER OF COURT OF COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY, MARCH TERM, 1964, NO. 5446.

OPINION OF THE COURT.

(Filed Aug. 5, 1964.)

BELL, *C. J.*

This appeal involves the validity of votes cast in Row C—which is miscalled by the appellant a "blank" Row—on voting machines in 15 Wards in Philadelphia. An analysis of the facts and the law, as well as the prior decisions of this Court require an affirmance of the Order of the lower Court. That Order affirmed a unanimous decision of the Board of Elections * which held that votes in the so-called 'but miscalled) blank Row C were invalid and void.

* Composed of two Democrats and one Republican.

The Jamestown machine, which is involved in 13 Wards, was set up as portrayed by the photographic exhibit of the voting machine which is hereto attached and made a part hereof.

Row C (erroneously called by appellant "a blank row") is the Row here involved. *Row C was marked* on the left in relatively small capital letters "SPECIAL ELECTION", and in *enormous* capital letters "REPUBLICAN". A long line was then drawn through the middle of this horizontal Row with an arrow at the end pointing to a Republican candidate Edward H. Rovner, with a pointer or lever over his name. A photograph of the pertinent parts of the voting machine is attached and made a part hereof as above mentioned, and clearly shows how to vote for a Democrat, if that was the voter's desire.

Subsection (d) of Article XII, Section 1216 of the Election Code (Act of June 3, 1937, P. L. 1333, 25 PS 3056) provides as follows:

> "(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer * or knob, *upon or adjacent* ** to which the name of such candidate is placed."

If there had been, on the part of any voter, the slightest doubt concerning (a) the set-up of the voting machine, or (b) the sample ballot, or (c) the way to vote for the candidate of his choice, he could lawfully *and without the slightest difficulty* have obtained assistance, explanation, directions and instructions. Sub-sections (a) and (b) of Section 1216 of the F ction Code pertinently provide as follows:

> "(a) In districts in which voting machines are used, the election officers shall, with the aid of the diagram authorized by this act and the mechanically operated model, instruct each elector before he enters the voting machine booth regarding the operation of

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* Herein called and referred to as a lever.

** Italics throughout, ours.

the machine, and shall give the elector opportunity personally to operate the model."

"(b) If any voter, after entering the voting machines booth and before the closing of such booth, shall ask for further instructions concerning the manner of voting, any one of the election officers may give him such instructions, ..."

Furthermore, every voter was entitled to a large sample ballot which informed him *twice*—not in confusing language, as appellant asserts, but in *brief clear* language, with a crystally clear picture or diagram—what a careful look at the voting machine would have rendered unnecessary, viz., to vote for a candidate of his choice he should "turn down a pointer *over* the name of each candidate *in your own party row.*"

Whether the instructions on the sample ballot were ambiguous and confusing as appellant contends, or were crystal clear as we assert, can be easily determined by reading it. It pertinently provides: "GENERAL PRIMARY AND SPECIAL ELECTION, TUESDAY, APRIL 28, 1964 (large caps).

INSTRUCTIONS TO VOTER (Smaller caps).

2nd. Turn down a pointer *over* the name of each candidate *in your own party row* that you wish to vote for,

from this position

to this position

and leave it there.

(You will note on the Ballot that the Republican Party occupies the first horizontal row, the Democratic Party the second horizontal row . . . *Just remember to turn down a pointer over the name of each candidate you wish to vote for . . .*)"

Notwithstanding all of the foregoing, and although these (Jamestown) voting machines have a lever (pointer) right over or above the name of each Republican candidate to *pull down* if the voter wishes to vote for a Republican, and a similar lever in the row right over or above the name of the Democrat candidate of his choice, if he wishes to vote for a Democrat, appellant contends that if a voter votes *in a different party Row and in a different space* his vote must nevertheles be counted—and it must be counted as if it were cast in the Row and in the space and for the person whom the Court thinks the voter meant to vote for, *but didn't.* In every election there are always some or many ballots which are held to be void and thrown out and not counted. Appellant contends that there were nearly 6000 votes for the Democratic nominee for the United States Senate in 13 Wards. Even if this be accurate, when broken down it amounts to less than 12 to a Division and less than 7 to each voting machine used in the 13 Wards.

Some voters pulled down levers into the miscalled "blank" Row C—a Republican Row—*under three spaces in Row B* (the Row above C) *where a Democrat's name appeared and some levers under five spaces in Row B, where no candidates' names appeared in Row B.* These are the votes which are challenged in this appeal. No one knows or can determine—*except by guessing,**—whether such votes, or indeed any votes in the blank spaces in Republican Row C, represented (1) protest votes, or (2) non-partisan votes, or (3) Republican votes, or (4) Democratic votes, or (5) votes

* If the Election Board had locked (or blocked off) at a cost of $3,000. the blank spaces on Row C, it would have prevented those controversial votes.

for Rovner, or (6) "mistake" votes; but in any event, they were illegally cast and were clearly and undoubtedly *void* votes! Moreover, there were several voting machines in which *no votes were cast in Row B,* but votes were cast in Rows A and C. This would indicate that these particular voting machines were used only by Republicans and Non-Partisans. Nevertheless, appellant contends that the votes of all Republicans and Democrats and Non-Partisan and protesting and mistaken voters which were cast in this *Republican* Row C, (1) were valid votes, and (2) were cast in favor of the Democratic candidate whose name, if any, appeared above or *near* these blank spaces in Republican Row C. If the pointers which were pulled down into Republican Row C under the name of Blatt or Roberts or Musmanno, represented valid votes for the nominee in Democratic Row B, Genevieve Blatt would have received 2,094 votes, David B. Roberts 181 votes, and Michael A. Musmanno 3,349 votes.

What is the use of a State having election laws to govern an election, what is the use of having *clearly marked voting machines,* and Rows on the voting machines which were *clearly marked for a Republican candidate and for a Democratic candidate,* as well as clearly marked sample ballots, if a Court has the right and power—as appellant argues—to ignore and nullify all of these *and substitute its "guess"* as to whom a voter intended to vote for if he hadn't voted carelessly or hurriedly or absent-mindedly or stupidly or protestingly and illegally?

Furthermore, appellant's contention not only ignores the clear language of the Act and the clear set-up of the voting machine and the clear language of the sample ballots, but it also flies in the teeth of numerous prior decisions of this Court: *Weber Appeal,* 399 Pa. 37, 159 A. 2d 901; *Pfaff v. Bacon,* 249 Pa. 297, 95 A. 71; *Rodgers Contested Election,* 234 Pa. 512, 83 A. 476; *Dailey's Appeal,* 232 Pa. 540, 81 A. 655; *Gulick Appeal,* 192 Pa. 446, 43 A. 972; *Newberry Township Election,* 187 Pa. 297, 40 A. 822; *Contested*

Election of Flynn, 181 Pa. 457, 37 A. 523; *McCowin's Appeal (Little Beaver Township School Directors' Election),* 165 Pa. 233, 30 A. 955; *Lawlor's Contested Election,* 180 Pa. 566, 37 A. 92; *Redman's Election,* 173 A. 59, 33 A. 703.

These cases in principle directly rule the instant case and require this Court to hold such votes to be void. For example, in *Contested Election of Flynn,* supra, the law required the ballot to be marked *with an X opposite* the name of the candidate for whom the voter wished to vote. One ballot was marked in the proper space but with a 1 instead of an X. Another ballot was marked with an X in the vacant square to the right of but below the name of the candidate. The third ballot was marked with a 1 on the line and in the square opposit a candidate's name and with an X in the vacant square below, viz:

COUNCIL (mark one)	
Edward J. Burke (3 years)	1
	X

Notwithstanding the fact that the voters' intention was clear, the Court *voided all* three ballots, thereby giving the election to the apparent loser, and said:

". . . On one of the ballots in question there is no mark in the square opposite the name of the candidate, but there is a cross mark (X) in the square below it. Not one of these ballots is marked according to law. In McCowin's Appeal, 165 Pa. 233, the present Chief Justice, after quoting from sections 14 and 22 of the act, said: 'The marking mentioned in the last quotation is applicable only to candidates whose names are printed in the official ballot. *They cannot be legally voted for in any other way than by marking as* specified in said section.' . . . To hold that the ballots in question are valid is to set aside the plain provisions of the act prescribing the place and manner of 'marking,' and to substitute therefor the *surmises* of the

election officers and the courts respecting the intention of the voter.

"The presumption is that the voter knows where and how to mark his ballot. He is furnished on his request with a card of instruction and a specimen ballot, and if by reason of any disability he desires assistance in the preparation of his ballot he is permitted to select a qualified elector of the district to aid him in the preparation of it. . . . For reasons already stated we decline to hold that the mark of a one (1) in the square provided for the cross mark, or a cross mark (X) in the square below it has the effect of a cross mark (X) in the proper place for it. It follows that the ballots in question should have been rejected as illegal."

Weber Appeal, 399 Pa., supra, likewise controls in principle the instant case. *Weber Appeal* involved the validity of 16 stickers for a "write-in" candidate, because of the manner in which the stickers had been attached.

Chief Justice JONES, speaking for a unanimous Court, refused to permit the stickers attached to a card to be regarded as votes for the candidate whose name was on the stickers and pertinently said (page 44):

"The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.* Thus it is, that any write-in or sticker which covers more of the ballot than the blank space pro-

* Justice COHEN quoted the *Weber* decision with approval in a recent dissenting opinion in *Reading Election Recount Case,* 410 Pa. 62, 66, 188 A. 2d 254, saying on pages 68 and 69: ". . . It is not important and of no great consequence that the government of the City of Reading may or may not be changed by the action of the majority—what is important and of great consequence is that our court has misread, misinterpreted and misapplied a clear legislative pronouncement. This is particularly true in the interpretation of the election laws which are basic to our democratic system. Hence, I am impelled to follow what Chief Justice JONES said in *Weber Appeal,* 399 Pa. 37, 44, 159 A. 2d 901, as recently as 1960: 'The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.'"

vided therefor *invalidates* the vote for the office under which the write-in or sticker appears. See McCowin's Appeal and Lawlor's Appeal, supra. . . . *A misplaced* write-in or sticker, whether on a ballot or on a voting machine, *is of no legal efficacy whatsoever.* To hold otherwise would render facile the way to fraudulent voting and the thwarting of the electorate's will.

"What this court said in Rodgers' Contested Election, 234 Pa. 512, 519, 83 A. 476, is presently peculiarly apposite: 'While it may be that the Court in this instance correctly guessed the intention of the voter, yet the fifty-seven mutilated ballots were not marked in accordance with the instructions contained in the Act of Assembly, and under the well established doctrine in this State they should not have been counted; to permit the counting of such ballots would be a precedent fraught with grave dangers for the future."

In *Peck et al. v Lackawanna County Board of Elections*, 44 Lackawanna Jurist 97, Justice EAGEN of this Court, then a Judge in Lackawanna County, said that votes cast on a voting machine Row *in exactly the same way* as they were cast in the instant case *would be invalid.* That case involved a mandamus proceeding concerning the locking of a voting row, so that well intentioned votes which were carelessly or stupidly "levered" would not be invalidated.

In the course of his Opinion Judge EAGEN said (page 98): "The unfortunate and repeated occurrence of *a candidate losing hundreds of votes* intended for him by well intending voters pulling a lever *over a blank space under his name* will be corrected by the ballot label setup proposed for use in this election."

The only exceptions are two classes of cases, neither of which is applicable—(1) minor irregularities, especially if committed by election officials, and (2) cases where a voter *voted correctly* in the right Row and in the right square and in the right space, but then added something which was surplusage.

Appellant gives three major reasons to support its contention:

(I) General expressions in Opinions in entirely inapposite cases about protecting the vote and the voter. Every Judge favors protecting the voter if that can be done in accordance with the law. However, the generalized quotations which appear throughout appellant's brief appeared in cases which, we repeat, have no relevance and no pertinency to the questions here involved.

(II) Appellant next relies upon Article XII, Section 1216(d) of the Election Code of 1937, supra, which pertinently provides (as above noted): "At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, *upon or adjacent* [not below, or in the Row of the opposite party] to which the name of such candidate is placed."

The interpretation which appellant places upon the word "adjacent" would allow a voter to vote on one machine *both "upon" and "adjacent"* to a candidate, *or* "upon" *or* "adjacent" to a candidate. Furthermore, under appellant's theory, the word "adjacent" could mean (1) *above*, or (2) *below*, or (3) to the *left*, or (4) to the *right*, or (5) *near* to the candidate's name, which realistically is both impractical and absurd. Section (d) clearly and undoubtedly means that a particular voting machine can have a pointer or lever which can be pulled down *upon* the name of the candidate of his choice, viz., a Jamestown machine, or a different type of machine, viz., a Shoup machine which was used in a number of Wards. The Shoup machine has a pointer or lever on the right side of the candidate's name (and can be pulled to the left and just beside the candidate's name) and consequently is *adjacent* to the name of the candidate. The Legislative Act is both clear and realistic. The word "upon" clearly covers and, we repeat, applies to the present Jamestown machine: the word "adja-

cent" would cover and apply to a different machine known the Shoup machine, where the pointer and appropriat voting space is, we repeat, on the right of and next to the candidate's name.

(III) The third reason urged by appellant is its desire to carry out the *surmised* intention of the voters and thus avoid "disfranchising" many voters. Such alleged disfranchisement is more superficial than real. In the first place, if there was any disfranchisement the voters carelessly or unthinkingly disfranchised themselves. But even this alleged disfranchisement would apply only to a vote for a United States Senator; it does not affect or invalidate these voters' votes for other candidates on the ballot or on the loan question.

The test which appellant urges us to adopt—no matter how window-dressed or camouflaged, is a "guess" test—it isn't what the voter did that counts, *it's what the Court guesses he intended to do, but didn't.* Such "guess" test would undoubtedly often produce confusion, uncertainty and interminable delay in election cases, thus jeopardizing a candidate's opportunity for successfully campaigning; it would multiply "election litigation"; and it would sometimes produce chaos in Government.

Appellant attempts to justify its "guess" as to "the intention" of the voters by citing several cases which state that ballots must not be "thrown out", or "an election voided", or "voters disfranchised" for "mere minor irregularities" or "technical violations". Until this argument was urged upon the Court, no one ever dreamed that to vote Republican, intending to vote for a Democrat was "a minor irregularity" or "a technical violation". In spite of the appellant's guess, a vote for a Republican, or a vote *in a Row clearly marked "Republican"* is not a vote for a Democrat!

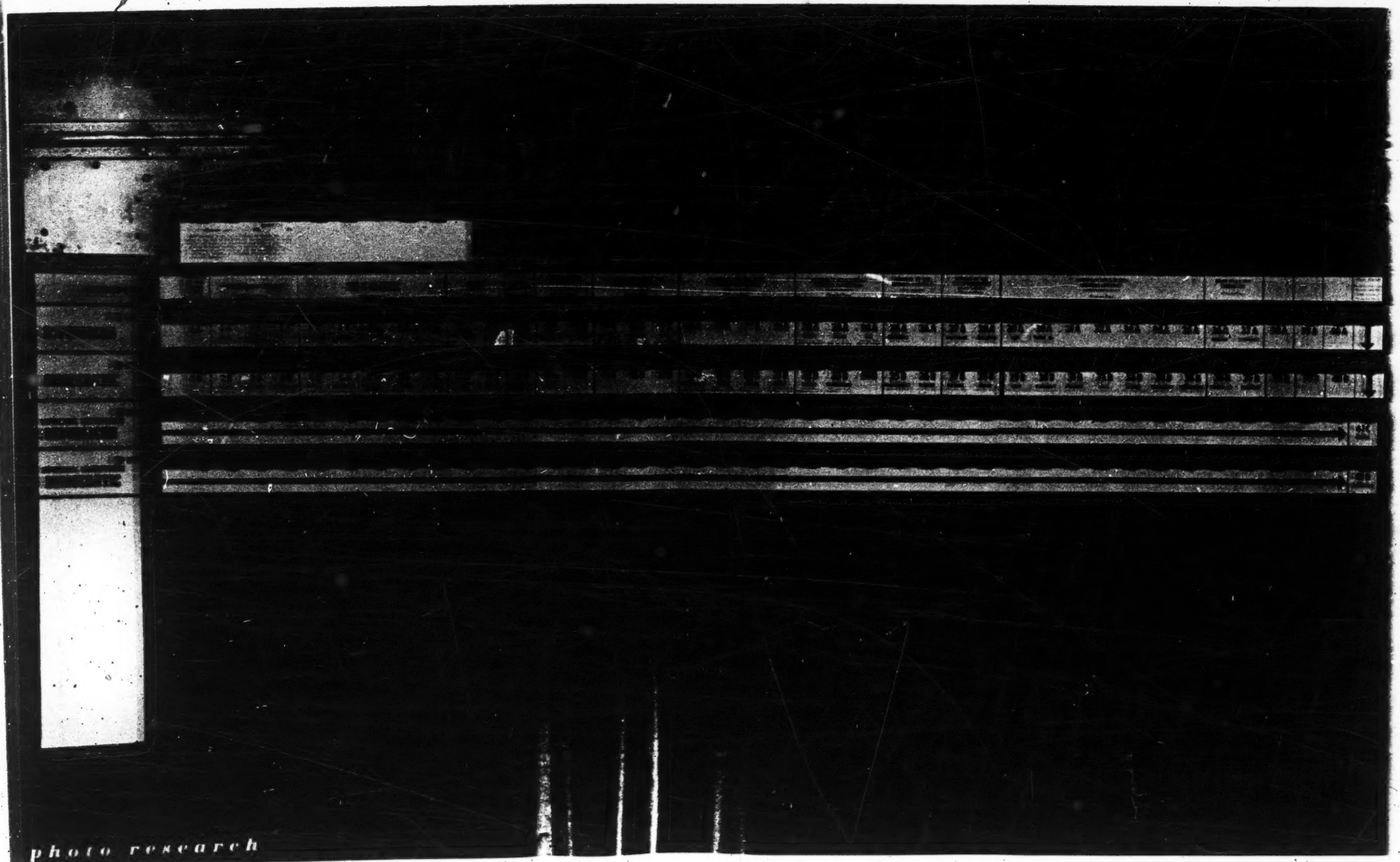
To summarize: In order to reach its conclusion, appellant misinterprets or ignores (1) the clear (pertinent) elec-

tion laws, and (2) the set-up of election machines which are clear to everyone except to a careless or an absent-minded or a hurried or an unthinking voter, and (3) the marked sample ballots which contain (a) very brief, clearly worded instructions, instructing a voter *twice* in clear, simple brief language which lever to pull *down* in order to vote for the Democrat or Republican candidate of his choice, as well as (b) a crystally clear illustration, and (4) the words at the left end of Row (C) which state in small capital letters "SPECIAL ELECTION" and *in very large capital letters* "REPUBLICAN", and (5) the line through the middle of Row C, with an arrow at the right end where the name of the candidate, Edward H. Rovner, appears, and (6) many prior decisions of this Court which, we repeat, in principle directly rule the instant case. Furthermore, appellant has not been deprived of any right ordained or guaranteed by the Constitution of the United States.

For each and all of these reasons, we affirm the Order of the Court below, which affirmed the unanimous decision of the Election Board.

Order affirmed.

Mr. Justice ROBERTS joins in the Opinion of the Court and also files a concurring Opinion. Mr. Justice EAGEN concurs in the result. Mr. Justice JONES files a dissenting Opinion in which Mr. Justice O'BRIEN joins.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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 329. January Term, 1964.

RE: PETITION OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA ON BEHALF OF ALL ITS ENDORSED CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58.

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, NO. 5446, MARCH TERM, 1964.

Entered June 8, 1964.

CONCURRING OPINION.

Filed August 5, 1964.

ROBERTS, *J.*:

I join in the opinion of the Chief Justice. An examination of the record facts, particularly of the voting machines which were set up as illustrated in the appended diagram, convinces me of the correctness of the result here reached. However, I do feel that I must add these observations.

This opinion is in no way a reflection upon any of the litigants. It is rather an expression of regret for the unforunate positions in which they have been placed by the inexcusable conduct of the County Board of Elections. Neither of the reasons offered by the Board for its failure

to prepare properly the voting machines by locking levers over blank spaces in rows C and D, as legally commanded, even approaches an acceptable explanation.[1] The Board improperly disregarded mandatory provisions of the Election Code and failed to perform clearly directed legal duties.

It is erroneous to assume that those voters who pulled levers in row C intended to vote for candidates whose names appeared above those levers but actually in row B. Such an assumption would be founded on nothing more than the exercise of retroactive clairvoyance as to what was intended on April 28 by 5,624 lever markings over blank spaces recorded on 908 voting machines in 512 election districts in 13 Philadelphia wards.

It is unmistakably evident from the ballot faces of the voting machines, as illustrated in the appended diagram, that votes for Democratic candidates whose names appear in the second horizontal row, marked "B", may be recorded only by the operation of levers above their names, as the hand pointer in that row clearly indicates. Moreover, there runs through the center of the blanks in row C (and also D) a heavy black line from column 1 through column 39 where an arrow points to the special election in column 40.

Likewise, the sample ballot contains four specific instructions which state with unmistakable clarity that to vote for a candidate, "Turn down a pointer over the name of each candidate in your own *party row* that you wish to vote for." (Emphasis in the original.) This instruction also advises that "the Democratic Party" occupies "the second horizontal row" (here row B), and in at least two other places the voter is cautioned that he may vote only for candidates of his party in the primary.

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1. The initial reason given for the failure to block all levers in rows C and D except for those to be used in the special election was that the Board did not wish to spend the $3,000 such action would require. At oral argument, the Board asserted that it had attempted to obtain covers for those levers approximately ten days prior to the election but that the manufacturer could not supply them in time.

It is an undisputed fact that levers in row C were operated in columns 1, 17, 18, 19 and others in which no names appeared either above in row B or below the levers in row C. Of particular interest is the use of columns 17, 18 and 19 in row C for the election of delegates to the *Republican* National Convention. If the "votes" recorded in columns 2, 3 and 4 of row C were validly cast for candidates in row B, so also were the "votes" in the remainder of row C, an obviously absurd conclusion.

It is conceded that all voters who entered the 908 voting machines in question could, irrespective of their party registrations, turn down levers in any of the columns in row C from column 1 through column 39 as well as the lever in column 40 for the special election. It is likewise undisputed that voters other than registered Democrats could and did operate levers in row C.[2] It would be fallacious to assume that since more Democrats appeared at the polls than the total votes cast for all Democratic senatorial candidates in rows B and C (asuming that the votes in C were for those candidates), only registered Democrats operated levers in row C.[3] Those voters who pulled levers in row C may have done so for the same reason as those Democrats (7,168) who failed or refused to vote for any of the senatorial candidates.

Nor can it be assumed that only registered Democrats voted in row C because it is unlawful to cross party lines

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2. In those divisions where separate machines were used for the Republican and Democratic primaries, respectively, votes were cast beneath the names of the Democratic candidates for the Senate in row C on the Republican voting machines. The proportion of such votes in row C to the total Republican vote on these machines was approximately the same as the proportion of row C votes to total votes on machines used for both parties. It should also be noted that some "votes" even appeared in columns 2, 3 and 4 of row D.

3. In the 15 wards in question (including two using the Shoup machines), 80,412 Democrats signed voters' certificates, whereas a total of only 73,244 levers were pulled down in both rows B and C combined in columns 2, 3 and 4. (Figures supplied by Democratic City Committee.)

in the primary, although the machines did not preclude such crossovers.[4] It may just as easily be assumed that the Democratic voters who intended to vote for the candidates followed the explicit voting instructions and pulled levers only in row B. Otherwise, the Legislature engaged in meaningless enactments of precautionary requirements to prevent crossover voting. The Legislature would have needed only to rely on a presumption that no one acts or votes contrary to the instructions and the Election Code.

To hold that the votes cast below the names of the candidates are valid would require the interpretation of "upon or adjacent" in Section 1216(a) of the Election Code as "*either* upon or adjacent." Under such a view, voters would be given the choice of pulling down the lever over the candidate's name, as the instructions provide, or pulling down the lever under the name, as appellants would have us hold. Appellants contend that the levers in row C, with no names appearing below them, are "adjacent" to the names in row B and would have us credit row B candidates with votes both above and below their names. The appearance of names in row C below the levers in row C would not make those levers any less "adjacent" to the names in row B. Thus, the absurd situation would result that in a general election, for example, the candidate in row A might also claim votes cast below in row B as "intended" for his name in row A and "adjacent" to it.[5]

Some concern has been voiced that by not counting the markings over the blanks in columns 2, 3 and 4 in row C

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4. An assumption that no crossovers took place is consistent with the "unwise" pre-election position of the Board of Elections that it would be unnecessary to lock rows C and D. However, following the election, the Board was satisfied that voters other than Democrats voted in row C and so found as a fact.

5. Even more confusion and uncertainty would result in a primary election in which the number of candidates for any office requires more than one row for listing their names.

Thus, the suggested interpretation of "upon or adjacent" would render useless thousands of voting machines in the Commonwealth.

and by not attributing those votes to candidates whose names appear in row B, 5,624 voters will be disfranchised. The application of this kind of paternalism would ignore the fact that 24 out of every 25 voters [6] who entered the voting booths in the districts in question voted correctly, regularly and in accordance with the instructions to voters. Also, no one knows who pulled the levers in row C, their party registrations, and the reasons for preferring to pull levers in row C rather than those in either rows A or B (it being admitted that all voters could operate levers in row C). Moreover, no one knows whether those who operated the levers in row C did so by mistake or by design, just as no one knows why 7,168 Democratic voters who entered the voting booths chose not to cast votes for any of the senatorial candidates.

Realistically, those voters who pulled improper levers in row C, columns 2, 3 and 4, are no more disfranchised than those who operated levers in other columns in that row where there were no names above or below. Thus, the voter who undertook to operate levers contrary to instructions and to established custom or who chose not to pull any lever at all is no more entitled to have his "vote" counted that the voter who failed to appear at the polls.

To give so much weight to so conjectural and expression of a minute minority (less than one out of 25) indeed would be an extreme overemphasis of the possible disfranchisement of 5,624 voters to the utter disregard of the more than 120,000 voters (both Republican and Democratic) in these districts who voted properly and in accord with the instructions on use of voting machines. This becomes even more apparent in light of the more than 1,000,000 votes properly cast without irregularity in the Democratic primary throughout the state.

Furthermore, it cannot truthfully be said that these 5,624 voters would be disfranchised since many may have

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6. More than 120,000 voters appeared at the polls in the wards here involved.

voted correctly for other candidates, on the loan question, and in the special election.[7]

Voting machines have been used in this Commonwealth for more than thirty years in the conduct of thousands of local, state and national election contests. No one has ever successfully contended that levers in one row may be utilized to vote for candidates whose names appear in another row.[8]

Under the circumstances here presented, our Court may not order row C "votes" to be counted for candidates whose names appear in row B.

Neither *Gray v. Sanders*, 372 U. S. 368, 83 S. Ct. 801 (1963), urged at argument, nor any earlier or more recent decision, compels, supports or even suggests a result contrary to that reached here. The Supreme Court did not say nor imply and surely did not intend that *invalidly* cast votes be counted under the doctrine of "one man, one vote," or any other theory just as that Court would not demand that

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7. The total of votes cast in columns 2, 3 and 4 of row C was much greater than the totals in columns further down the row.

8. In *Application of Lester*, 127 N. Y. S. 2d 272 (Sup. Ct. 1953), as in the instant case (except for the special election), the Republican candidates were on row A, Democratic candidates on row B, and no candidates on row C. There, as here, the law required that each lever on row C should be locked. In both cases, this was not done and constituted an absolute failure to perform a duty specifically commanded by statute. There, as here, when the machines were opened, it was found that some levers had been pulled in row C. It was maintained that since the votes cast in row C were in closest proximity to row B, it was to be inferred that those who pulled levers in row C did so with the intention of voting for the candidates in row B. The New York court rejected this contention, just as did the Philadelphia County Board of Elections, the court below, and now this Court. The New York court held that the inference there urged ". . . is not the only inference to be drawn. No one knows what voters cast their votes in Row C. If it were done by error, rather than by design, then not even the voters who did so, could now so state, since they are probably without knowledge that they did so. There is no way of telling whether those who cast their votes in Row C did so designedly, because they had no intention of voting for either of the two major parties' nominees." *Id.* at 276.

each voter who appeared at the polls cast a vote for each office. In this proceeding no claim was made by a voter or litigant that any voter was denied the right to vote or refused the opportunity to cast his ballot. So, too, no federal question—constitutional or otherwise—was raised, submitted or argued in this appeal. The record fails to reveal the presence of any such question.

We must not be misguided or misled by what is asserted to be possible disfranchisement of those relatively few voters who operated levers in a manner other than in accordance with the clear instructions and the election laws. Our concern must lie primarily with the preservation of the sanctity of the election process by giving effect to those votes properly cast. To do otherwise is to ignore the prescribed rules of the contest. Obviously, such action destroys not only the recognized machinery for expressing and recording the preference of voters but also imperils the whole orderly electoral process.

Another look at the appended diagram (of the face of the voting machine ballot) reinforces the correctness of the determinations of the Board and the court below. That additional look also further re-emphasizes the propriety and wisdom of affirmance here.

IN THE SUPREME COURT OF PENNSYLVANIA
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APPEAL FROM ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, No. 5446 MARCH TERM, 1964.

Entered June 8, 1964.

DISSENTING OPINION.

Filed August 5, 1964.

JONES, *J.*

Convinced that the decision of the majority of this Court, which results in the disfranchisement of thousands of voters, is contrary both to law and common sense, I register my dissent.

The *stated* bases of the majority's ruling are: (1) the election law clearly proscribes the manner in which these disputed votes were cast; (2) the "set-up of [the] voting machines" was "clear to everyone"; (3) the "sample ballots" [herein called by the statutory term "specimen ballots"] were clearly worded and illustrated and they in-

structed the voters which lever to operate; (4) the words "Special Election, REPUBLICAN" to the left of Row C and the line drawn horizontally across Row C on the machines constituted clear instructions which were ignored by the voters; (5) the case law in this Commonwealth "directly rule[s] the instant case". In this opinion, I shall endeavor to demonstrate—not in the same order—the infirmity of each and all the bases upon which the majority opinion rests.

On this appeal we are called upon to determine the validity of certain votes allegedly cast for certain candidates in thirteen wards of the City of Philadelphia at the primary election held on April 28, 1964.

The disputed votes were cast upon voting machines,[1] not paper ballots. In the thirteen wards involved in this appeal a special election was conducted for representative in the U. S. Congress; by reason of that fact, two additional horizontal voting rows were added to each machine. The top row of each machine contained the designation of the various offices for which the electors were to select candidates, including that of representative in the U. S. Congress.[2] The second row—Row A—, at the extreme left whereof was the name "Republican"—, contained the names of the Republican candidates for the various offices and within each ballot label thereon were a numeral or numerals and the name or names of the Republican candidate or candidates for the particular office. The third row—Row B—, at the extreme left whereof was the name "Democratic"—, contained the names of the Democratic candidates for the various offices and each ballot label thereon

1. In *all* the wards involved in this appeal, the Jamestown type of voting machine—wherein the voting rows are arranged horizontally—was used. In the 43rd and 49th wards, which are not involved in this appeal but to which reference is made in the briefs, the Shoup type of voting machine—wherein the voting rows are arranged vertically—was used.

2. From the "ballot label" containing the name of the office "Representative in Congress" on the top row, an arrow, pointing downward, crossed Rows A and B and ended at Row C.

was arranged in the same manner as in Row A. The fourth row—Row C—, at the extreme left whereof appeared the words "Special Election, REPUBLICAN", contained no names whatsoever,[3] except that at the extreme right end thereof appeared the name of the Republican congressional candidate at the special election, and, across Row C, was an arrow which extended to the ballot label wherein appeared the name of the Republican congressional candidate. The fifth row—Row D—, at the extreme left whereof appeared the words "Special Election, DEMOCRATIC", was similar in all respects to Row C, except that at the extreme right thereof appeared the name of the Democratic congressional candidate. Upon this appeal, we are concerned only with the validity of the votes cast in Row C by the depression of the levers directly *above* Row C and *below* the names of the Democratic candidates in Row B, excluding, of course, votes cast in Row C for the Republican congressional candidate at the special election.

Between the top row and Row A and extending horizontally across the machine was a panel of levers marked "A"; between the second row—Row A—and the third row —Row B—was another panel of levers marked "B"; between the third row—Row B—and the fourth row—Row C —was another panel of levers marked "C". When a Republican voter entered the polling booth, the levers in panel "A"—*above* the names of the Republican candidates—were unlocked and the levers in panel "C"—*below* the names of the Democratic candidates—were unlocked but the levers in panel "B"—*belpw* the names of the Republican candidates—were locked. When a Democratic voter entered the polling booth, both the levers in panel "B"—*above* the names of the Democratic candidates—and the levers in panel "C"—*below* the names of the Democratic candidates—were unlocked so that a Democratic voter could

3. The majority opinion repetitively condemns the Committee's reference to Row C as a "blank row". The *fact* is that Row C *was* "blank" in that it did not contain the names of any candidates, except that of the Republican congressional candidate.

depress and operate *either*[4] the levers *above* or *below* the Democratic candidates' names. *However, no Democratic voter could vote more than once or for more than one candidate (where only one was to be nominated.)*

That which has given rise to this controversy is the undisputed fact that *all* the levers in the panel marked "C" were permitted to remain unlocked and susceptible of operation by the voters whereas *only* the lever in the panel marked "C" above the name of the Republican congressional candidate should have been permitted to remain unlocked.[5] *Complete responsibility for this improper condition of these voting machines must rest upon the City Board of Elections [the Board].* It is undisputed that the Democratic County Committee (the present appellant), *prior to the date of the primary election,* advised the Board

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4. *Both* the levers in panel "B" and in panel "C" *above* and *below* a particular candidate's name could not be depressed and operated so that thes voter could vote twice for such candidate. The majority opinion states: "The interpretation which [the Committee] places [upon the word 'adjacent' in the statute] would allow a voter to vote on one machine *both 'upon' and 'adjacent'* to a candidate . . . ." *No one* contends a voter could vote *both* above and adjacent to the candidate's name; it is undisputed that the set-up of the machines did not permit such dual voting.

5. Cf: Section 1107 of the Election Code (25 P. S. § 3007) which specifically provides: "No voting machine shall, upon any examination or re-examination, be approved by the Secretary of the Commonwealth, or by any examiner appointed by him, unless it shall, at the time, satisfy the following requirement: * * * (e) *It shall preclude each voter from voting for any candidate,* or upon any question, *for whom* or upon which *he is not entitled to vote,* an[d] from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once, except in districts and for offices where cumulative voting is authorized by law. * * * (f) It shall be capable of adjustment by election officers, so as to permit each voter at a primary election to vote only for the candidates for non-partisan nomination, if any, and for the candidates seeking nomination by the political party in which he is registered and enrolled, if he is enrolled as a member of a political party, and *so as to preclude him from voting for the candidates seeking nomination by any political party in which he is not enrolled.*" (Emphasis supplied.)

of the improper condition of these machines and requested the Board to lock the levers in panel "C", except as to the Republican congressional candidate. The Board refused the committee's request and, as the court below sagely observed, "[t]hat was not a wise decision".[6]

After the election was held and the votes canvassed, it was then discovered that, in the thirteen wards involved in this appeal, 5624 voters had cast votes in Row C by the depression of the unlocked levers in panel "C" directly *below* the names of the Democratic candidates for the U. S. Senate listed in Row B.[7] The Board, inter alia, refused to count and credit such votes. An appeal was taken by the Committee to the Court of Common Pleas of Philadelphia County and that court upheld the action of the Board. From that order, the present appeal was taken.

The rationale of the court below, adopted in large part by the majority opinion, was: (a) that the failure of the voters to indicate their choice in accordance with the election statute rendered void their votes; (b) in reliance on *Contested Election of Flynn*, 181 Pa. 457, 37 A. 523, that "neither our courts nor our election officers are permitted to surmise the intentions of the voters, and [that] an elector's non-compliance with proper voting procedure is inexcusable"; (c) that the depression of a lever above a blank space on Row C constituted an inexcusable non-compliance with statutorily-required voting procedure on the part of

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6. Counsel for Miss Blatt (the appellee) contends the Committee should have applied for relief to the courts and that, not having done so, the Committee cannot now be heard to complain. Appellee fails to take into account that she had equal opportunity to act and did not do so. If any fault is to be imputed to the Committee in this respect, appellee must share in it.

7. The majority opinion seeks to minimize the result of its ruling by stating that the "number of questioned votes" was "less than 12 to a Division and less than 6 to every voting machine used in the fifteen [should be thirteen] wards". What the majority opinion fails to state is that there were 908 voting machines and 512 election districts in the 13 wards involved in this appeal.

the voters;[8] (d) that the attempted vote in a blank space on Row C constituted a nullity.

At the outset, reference must be made to the respective positions taken by the Committee and appellee. The Committee contends: (1) that the intent of the voters, if it can be ascertained, should control, that it is to be presumed that a vote is validly cast and that the disfranchisement of voters should not be permitted because of minor irregularities or technical violations of the election procedures; (2) that the intent of the voters who depressed the levers in panel "C" is clear i.e., to vote for the particular candidates whose names appeared directly *above* the levers; (3) that, in ascertaining the intent of the voters, consideration must be given to the fact that the voting took place on complicated voting machines upon which, through the election officials' inaction, a condition had been permitted to exist whereby the voters could depress either the levers in panel "B" or panel "C", and, under such circumstances, courts and canvassing boards should exercise great liberality in determining the validity of votes cast in Row C; (4) in the absence of evidence to the contrary and in view of the presumption that voters vote legally, the votes cast by the depression of the levers in panel "C" must be regarded as having been cast by Democratic voters rather than by "cross over" Republican and Non-Partisan voters. Appellee takes the position: (1) that the votes recorded in Row C are void because they were not recorded in the proper voting space; (2) that the case law, cited by the Committee, is inapposite because such case law dealt with votes cast in the proper voting space whereas in the case at bar the votes were cast in an improper space; (3) that the depression of the levers on the blank spaces in Row C constituted an "inexcusable non-compliance" with proper voting procedures; (4) that the record indicates "cross

8. The court below, significantly, failed to note that the lever which the voters depressed was directly *below* the name of a Democratic candidate.

over'' voting by Republican and Non-Partisan voters whose votes cannot be segregated from votes cast by Democratic voters and, therefore, all the votes cast in Row C must be declared void.

Certain matters are beyond question. First, there is neither allegation nor proof of any fraud on the part of the voters, the election officials, or anyone else. Second, this controversy would not be before us were it not for the impact of the validity of these votes on the contest for the Democratic nomination for the U. S. Senate.[9] Third, a proper setup of the voting machines would have insured that the levers in panel ''C'' were locked and placed in a condition wherein they could not have been depressed[10] and the sole responsibility for this improper setup of the machine rests with the Board. Fourth, the votes recorded in Row C were made by voters who depressed the levers in panel ''C''. Fifth, the total number of votes in Rows B and C in the Democratic senatorial contest was considerably less than the total number of Democratic voters who entered the voting booths, i.e., those voters who signed the requisite affidavits and voted. Lastly, an examination of the face of the voting machines, with particular reference to the ballot label wherein the names of the Democratic senatorial candidates appeared, indicates that the upper levers—those in panel ''B''—and the lower levers—those in panel ''C''—were equidistant vertically from the names of the respective candidates and in exact juxtaposition horizontally to such names.

Initially, we must inquire whether the operation by the voters of the levers in panel ''C'', *directly below* the can-

9. 5624 votes were cast in Row C by the depression of levers in panel "C" *below* the names of the three candidates for the Democratic nomination for the U. S. Senate. Of such votes cast, a tabulation shows: 2094 for Genevieve Blatt, 181 for David Roberts and 3349 for Michael Musmanno. It is highly significant that, throughout all the voting districts involved in this appeal, there was a *definite pattern* of voters utilizing the levers in panel "C" to cast their votes.

10. Except, of course, the lever above the name of the Republican congressional candidate.

didates' names, violated the election statute and to that end we must examine the election statute to ascertain *how* a voter must vote on a voting machine.

Section 1216 of the Election Code [11] purports to answer that question, its heading being "Instructions of voters and manner of voting in districts in which voting machines are used." Section 1216(a) provides for the instruction of electors by the election officials "with the aid of the diagrams authorized by [the] act and the mechanically operated model." [12] Section 1216(d) provides the *manner* of voting on a voting machine at a primary election: "At primaries, he [the voter] shall vote for each candidate individually by operating the key, handle, pointer or knob, *upon or adjacent to which the name of such candidate is placed.*" (Emphasis supplied.) In construing Section 1216(d), we must recall that which this Court said in *Independence Party Nomination*, 208 Pa. 108, 112, 57 A. 344: "The constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right and each elector is entitled to express his own individual will in his own way. His right cannot be denied, qualified or restricted, and is only subject to such regulation as to the manner of exercise, as is necessary for the peaceable and orderly exercise of the same right in other electors. The constitution itself regulates the times and in a general way the method, to wit: by ballot, with certain specified directions as to receiving and recording it. Beyond this the legislature has the power to regulate the details of place, time, manner, etc., in the general interest for the due and orderly exercise of the franchise by all electors alike. Legislative regulation has been sustained

11. Act of June 3, 1937, P. L. 1333, art. XII, Sec. 1216, 25 PS § 3056.

12. In the case at bar, small demonstration machines were furnished to the voting places but such machines did not contain Rows C and D. The voting machines themselves contained no instructions and the sample ballots only added to the confusion, see, infra.

on this ground alone: [citing a case]. Anything beyond this is not regulation but unconstitutional restriction. It is never to be overlooked therefore that the requirement of the use of an official ballot is a questionable exercise of legislative power and even in the most favorable view treads closely on the border of a void interference with the individual elector. *Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector".* (Emphasis supplied.)

The approach to a construction of Section 1216(d) of the Election Code must begin with an examination of our statutory law, past and present, prescribing the manner in which an elector must cast his vote for a candidate whose name appears on the ballot. It must be noted, of course, that until the passage of the Voting Machine Law of 1929 (Act of April 18, 1929, P. L. 549), all voting was by paper ballot and, therefore, the pre-1929 statutory law referred only to voting by such method.

Section 14 of the Act of 1893 (Act of June 10, 1893, P. L. 419) provided, inter alia, that the ballot should "be so printed as to give to each voter a clear opportunity to designate his choice of candidates by a cross mark (x) *in a square of sufficient size at the right of the name of each candidate and inside the line enclosing the column",* (Emphasis supplied), and Section 22 of that act provided, inter alia, that the voter should prepare his ballot by placing "a cross (x) . . . *opposite the name* of the candidate of his choice for each office to be filled, according to the number of persons to be voted for by him for each office, ..." (Emphasis supplied.) This act *clearly* indicated *how* and *where* on the ballot the voter must cast his vote, i.e., the voter was required to place a cross (x) in a square to the right of and opposite the name of the candidate of his choice.[13]

13. Construing this statute, this Court held that a *strict* compliance was required to validate a vote: *Contested Election of Flynn,* 181 Pa. 457, 37 A. 523, (where on one ballot a "1" rather than an "x" was placed, on another ballot an "x" was placed to the right of

Sections 14 and 22 of the 1893 statute were amended by the Act of 1903, (Act of April 29, 1903, P. L. 338).[14] However, that statute, insofar as presently pertinent, did not change the manner of casting a vote as required by the 1893 statute.[15]

In 1919, the legislature again amended Section 22 of the 1893 statute: Act of July 9, 1919, P. L. 829.[16] As this Court said: "This amendment of 1919 was enacted to give effect more adequately to the intent of the voter; it is remedial in purpose and should be liberally construed to the end intended.": *Gegg's Election*, 281 Pa. 155, 160, 126 A. 260. So far as presently pertinent, the 1919 statute provided that a voter "may . . . make a cross-mark in the square to the right of any individual candidate whom he favors" and, where more than one candidate is to be elected to any office, "the voter shall, if he desires to divide his vote among candidates of different parties, make a cross (x) mark in the appropriate square to the right of each

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the candidate's name but not in the square opposite the candidate's name and on a third ballot where a "1" rather than an "x" was placed in the square opposite the name of the candidate and an "x" placed to the right of the name but not in the square opposite the name and all three ballots were held void). See also: *McCowin's Appeal*, 165 Pa. 233, 30 A. 955; *Redman's Election*, 173 Pa. 59, 33 A. 703; *Newberry Township Election*, 187 Pa. 297, 40 A. 822. Cf. *Gulick Appeal*, 192 Pa. 446, 43 A. 972.

14. The 1903 statute used the words "voter may", instead of "voter shall", but this Court held that such change of language was immaterial: *Dailey's Appeal*, 232 Pa. 540, 81 A. 655.

15. Subsequent to the 1903 statute, this Court continued to require a literal and strict compliance with the manner of voting prescribed in the statute: *Dailey's Appeal*, supra; *Rodgers' Contested Election*, 234 Pa. 512, 83 A. 476; *Pfaff v. Bacon*, 249 Pa. 297, 95 A. 71. In *Pfaff*, it is interesting to note the language of Mr. Justice Mestrezat, in dissent, that "a ballot cannot be rejected unless it is so marked as to make it impossible to determine the voter's choice. This is the only ground or reason for which a vote may not be counted." (p. 312).

16. The Act of June 22, 1931, P. L. 628, further amended Sections 14 and 22 of the 1893 Statute but in a manner not presently pertinent.

candidate for whom he desires to vote . . ." The pertinent sections of the 1893 statute were finally repealed by the Election Code of 1937[17] and Section 1215(b) thereof now provides the manner of voting on paper ballots, i.e., that a voter, at a primary election, "shall vote for the candidate of his choice for nomination or election, . . . by making a cross (x) or check (✓) in the square opposite the name of the candidate. . . ."

Such examination of our statutory law, past and present, on the manner of voting *by the use of paper ballots* indicates beyond question that the legislature *clearly* directed both *how* a voter should vote, i.e., originally by a cross, but now by a cross or check, and *where* such vote should be marked, i.e., in the square opposite the candidate's name, etc. Therefore, in considering our case law dealing with irregularities in the manner of voting on paper ballots, it must be kept in mind that the legislature has *always* clearly declared both *how* and *where* votes on paper ballots must be cast.

However, an examination of the legislative direction *as to the manner of voting on voting machines* reveals an entirely different situation. In making this examination it must be noted that voting machines, whether the rows thereon be arranged vertically or horizontally, contain "ballot labels", i.e., "the cards, papers or other material, containing the names of offices and candidates . . ." (Election Code of 1937, art. XI, § 1101, 25 PS § 3001), and these "ballot labels" are comparable to the squares on the paper ballots.

The Voting Machine Act of 1929, now repealed by an Election Code of 1937, was silent on the manner of voting a ballot on a voting machine. At the present time the manner of voting on voting machines is governed, insofar as primary elections are concerned, by Section 1216(d) of the

17. The Act of June 3, 1937, P. L. 1333, art. XII, § 1215, as amended by the Act of January 8, 1960, P. L. (1959), 2143, § 3, 25 PS § 3055.

Election Code (25 PS § 3056) which, I repeat, provides, in pertinent part: "At primaries, he [the voter] shall vote for each candidate individually by operating the key, handle, pointer or knob,[18] upon or adjacent to which the name of such candidate is placed." That provision *clearly* states *how* the voter shall vote, i.e., by operating the lever, but does it provide with any degree of clarity *where* or *by which lever* the voter shall vote? The phrase "upon or adjacent to which the name of such candidate is placed" is clearly adjectival in nature, descriptive of the lever which the voter shall operate and limits and restricts the voter to that lever which is "upon or adjacent to" the candidate's name. The word "or" is used as a disjunctive particle that marks an alternative and differentiates between that lever which is "*upon*" and that lever which is "adjacent to".[19] The use of the word "or" together with the fact that "upon" and "adjacent" are not only not synonymous but differ in meaning[20] point to a possible legislative intent that either

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18. In this opinion I have adopted the language of the parties and refer to the "key, handle, pointer or knob" as the lever.

19. *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 431, 192 A. 2d 682; *Marnell v. Mount Carmel Jt. School System*, 380 Pa. 83, 88, 110 A. 2d 357.

20. Words of a statute must be construed "according to their common usage . . .:" Statutory Construction Act of May 28, 1937, P. L. 1019, art. III, § 33, 46 PS § 533; *Breslow v. School District of Baldwin*, 408 Pa. 121, 182 A. 2d 501. In *Commonwealth v. Lanzetti et al.*, 97 Pa. Superior Ct. 126, 128, it was said: ". . . we are not justified in going so far as to hold that the word 'upon' is to be construed as 'adjacent'." "Upon" has been defined as "upward as to be on", "on or upon one", "on the surface": Webster's New International Dictionary, (2d Ed.) p. 2800. "Adjacent" has been defined as "lying near or close to; sometimes contiguous, neighboring. It implies that two objects are not widely separated though they not be actually touching": Black's Law Dictionary. "Adjacent" has been construed in the courts: *Allentown v. Wagner*, 27 Pa. Superior Ct. 485, 493 ("implies nearness to but not necessarily actual contact"); *Camp Hill Borough*, 142 Pa. 511, 517, 21 A. 978 ("adjoining or contiguous"); *Hanifen v. Armitage*, 117 F. 845 ("lying near, close, or contiguous, but not actually touching").

one of two levers may be operated by the voter, i.e., that lever "upon . . . which the name of [the] candidate is placed" or that lever "adjacent to which the name of [the] candidate is placed.[21] In my opinion, the legislative description of the lever to be operated by the voter is vague, uncertain and ambiguous. From the language employed it is arguable that "upon" refers to the lever directly *above* the name of the candidate and that "adjacent" refers either to the lever *below* or the lever *above* the name of the candidate because both levers are "adjacent" to the candidate's name. This loosely and carelessly drawn piece of legislation is not only uncertain and ambiguous but confusing. At best, the legislative direction in Section 1216(d) is doubtful and, in such event, the statute must be construed in the manner most favorable to the voter: *Independence Party Nomination*, supra. In view of the uncertain and dubious language of the statute, how can we now hold that the operation of the lower levers in panel "C", even though such operation recorded the votes in the blank spaces on Row C, constituted a *clear* violation of, or a *clear* non-compliance with, the language of Section 1216(d) of the Election Code so as to justify the disfranchisement of upwards of 5000 voters?

Moreover, even the most cursory comparison of the several statutes, past and present, prescribing the manner of voting on paper ballots with the statutory provision prescribing the manner of voting on voting machines reveals that the case law on paper ballots and irregularities in voting thereon cannot be considered as precedents in deter-

21. The majority opinion says the statute is "both clear and realistic" and that the "word 'upon' clearly covers, and, . . . , applies to the present Jamestown machine; the word 'adjacent' would cover and apply to a different machine known as the Shoup machine . . . ." Such construction is completely unsupported by *any* evidence whatsoever. When the election statute was enacted were there Jamestown and Shoup machines? If there were, did the legislature have knowledge of such fact? This is a startling example of statutory construction by judicial wishful thinking.

mining the manner of voting on voting machines and irregularities in such voting.[22]

However, assuming, arguendo, that the operation of the levers in panel "C" was a technical non-compliance with Section 1216(d) and assuming that the intent of those who so operated the levers can be ascertained, does the fact of such technical non-compliance with the statute *per se* invalidate these votes? The court below and the majority of this Court equate non-compliance with the election statute with invalidity of the votes, *regardless of the intent of the voters;* in so doing, in my opinion, they err.

From 1893 until the passage of the 1919 statute our courts did maintain a rigid and unbending rule which, in effect, rendered invalid any votes cast which were not in strict and literal compliance with the statute, regardless of whether the intent of the voter could be ascertained from the ballot: *McCowin's Appeal,* supra; *Redman's Election,* supra; *Contested Election of Flynn,* supra; *Newberry Township Election,* supra; *Dailey's Appeal,* supra; *Rodgers' Contested Election,*[23] supra. The rigidity of such a rule is particularly difficult to understand since Section 27 of the 1903 statute, at least impliedly, granted recognition and consideration to the ascertainment of the voter's intent.[24]

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22. *Pfaff v. Bacon,* 249 Pa. 297, 95 A. 71; *Rodgers' Contested Election,* 234 Pa. 512, 83 A. 476; *Dailey's Appeal,* 232 Pa. 540, 81 A. 655; *Gulick Appeal,* 192 Pa. 446, 43 A. 972; *Newberry Township Election,* 187 Pa. 297, 40 A. 822; *Contested Election of Flynn,* 181 Pa. 457, 37 A. 523; *McCowin's Appeal,* 165 Pa. 233, 30 A. 955; *Lawlor's Contested Election,* 180 Pa. 566, 37 A. 92; *Redman's Election,* 173 Pa. 59, 33 A. 703, relied on by the majority, all dealt with voting by paper ballots, and, in no sense, control the case at bar.

23. In *Rodgers,* this Court, even though it conceded that the court below had ascertained the voter's intent, refused to accord any weight to such intent.

24. Inter alia, Section 27 provided: "If a voter has marked his ballot otherwise than directed by this act, so that for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office; . . . ."

However, since the passage of the 1919 statute this Court properly has been more liberal and has given recognition and weight to the intent of the voter, once ascertained. In *Knight v. Coudersport Borough*, 246 Pa. 284, 289, 92 A. 299, we approved that which was said in Black on Interpretation of Laws: "If the law declares a specified irregularity to be fatal, the court will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a full and free expression of the popular will. If it had, the regularity is held to vitiate the entire return; otherwise, it is considered immaterial." See also: *Fish's Election*, 273 Pa. 410, 117 A. 85. *Gegg's Election*, supra. The attitude of our Court in this area of the law, in recent times, has been well epitomized in *Norwood Election Contest Case*, 382 Pa. 547, 552, 116 A. 2d 552: "Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." In *McCracken Appeal*, 370 Pa. 562, 566, 88 A. 2d 878, we said: "In any disputed election, nothing can be more vital towards the accomplishment of an honest and just election than the ascertainment of the intention of the voter." See also: *James Appeal*, 377 Pa. 405, 408, 105 A. 2d 64; *Reading Election Recount Case*, 410 Pa. 62, 66, 188 A. 2d 254. If, from the ballot cast, the intent of the voter in his choice of a candidate for office can be ascertained, then such ascertained intent must be granted full recognition and the ballot counted, even though there be a technical non-compliance with the election statute. See: *Arnold Borough Contested Election*, 307 Pa. 536, 161 A. 536.[25]

25. Such is the rule in other jurisdictions: *Green v. Independent Consolidated School District*, 252 Minn. 36, 89 N. W. 2d 12; *Redfearn v. Board of State Canvassers*, 234 S. C. 140, 107 S. E. 2d 10; *Hall v. Barton*, 290 Mass. 476, 195 N. E. 753; *Turner v. Board of Education*, Ky. 266 S. W. 2d 321; *Re Creedon*, 264 N. Y. 40; *Thompson v. Boling*, 240 Ky. 340, 42 S. W. 2d 321.

What was the intent of the voters who operated the levers in panel "C"? In my opinion, such intent was to vote for the Democratic senatorial candidates whose names appeared *directly above* the levers operated. When a voter depressed the lever in panel "C" *directly below* the name of Genevieve Blatt, he intended to vote for Miss Blatt; likewise, as to those voters who depressed the levers *directly under or below* the names of David Roberts and Michael Musmanno. In *Peck et al. v. Lackawanna County Board of Elections,* 33 Lack. Jurist, 97, Judge (now Mr. Justice) Eagen fully recognized that such was the intent on the part of voters pulling a lever *under* the name of a candidate. As a matter of fact, the court in *Application of Lester et al.,* 127 N. Y. S. 2d 272, so heavily relied on by appellee, conceded that "practical experience has demonstrated that there may be much force in [the] argument" that those who cast their votes in Row C of a voting machine do so in error by pulling the lever *below* rather than that *above* the candidate's name, at the time intending to vote for such candidate.

The majority opinion, labeling the finding of the voters' intent as a "guess", concludes that such a "guess" as to intent, if permitted to stand, would occasion dire results perhaps even "chaos" in government. With that I thoroughly disagree. In many areas of the law courts must and do ascertain, from language and/or conduct, the intent of an individual. As an example, time and again we have said that, in the construction of wills, the "polestar" is the intent of the testator and we then have proceeded, by placing ourselves in the "armchair" of the testator and by examining the language and scheme of his will and the surrounding circumstances, to ascertain what the testator intended: *Woodward Estate,* 407 Pa. 638, 640, 182 A. 2d 732. Was such intent arrived at by "guess", speculation or conjecture? I think not. In the case at bar, believing as I do that in election cases we must give recognition to the intent of a voter if ascertained, why cannot we place our-

selves in the position of a voter in the polling booth, examine what confronted him and what he did and, considering all the surrounding circumstances, ascertain his intent? Granted that in construing a will we have principally the language of the testator before us and we determine what he meant by what he said, it seems to me that we can just as well determine what a voter meant by what he did; conduct can be just as eloquently communicative of intent as the written word. The ascertainment of the voters' intent is not a "guess"; it is an opinion arrived at after a careful marshalling of all the data necessary to the formulation of such opinion.

If the voters by depressing the levers did not intend thereby to vote for the candidates whose names appeared *directly above,* such levers, what did they intend? The majority opinion offers several alternatives, i.e., such votes were "protest" votes, "cross-over" votes or "mistake votes". If there were "protest" votes, against whom or what was the protest? On this subject the record is silent and the majority opinion furnishes no support for its suggestion. Were these "cross-over" votes? Appellee contends that Republican and Non-Partisan voters "crossed over" and registered their votes for Democratic candidates. In support of this contention, appellee points out that the levers in panel "C" were unlocked to Republican and Non-Partisan voters as well as Democratic voters, that on 17 voting machines used only by non-Democratic voters a total of 60 votes appeared in the senatorial columns of Row C and that, by a projection of the ratio shown on those machines to all the machines in the thirteen wards, the conclusion must be reached that approximately 1378 of the 5624 votes in Row C were cast by Republican or Non-Partisan voters.[27] In this connection, it must be noted

27. This is sheer speculation. There was no evidence that 17 voting machines were used only by Non-Democratic voters. This was a presumption indulged in by the appellee and unfortunately accepted by the majority. Courts "cannot act on conjecture." (Matter of Creedon, 264 N. Y. 40). It could well be that the 60

that the total number of votes cast in Rows B and C were less than the total number of Democratic voters who actually voted. If appellee's contention is sound, then over 1300 Republican or Non-Partisan voters directly violated the election laws by participating in a Democratic party primary. Such a contention, unsupported as it is by any proof, falls in the face of the presumption long adhered to by this Court that, when a person acts, it is to be presumed that he acts in compliance with, not in violation of, the law: *Simon Election Case*, 353 Pa. 514, 521, 46 A. 2d 243. To paraphrase the language of Chief Justice Maxey in *Simon*, supra, illegality cannot be proved by merely showing illegality-facilitating circumstances. What appellee—and now the majority of this Court—urges is that it is *possible* that there were "cross over" votes cast in Row C; I would remind appellee and the majority of this Court that we said in *Winograd et al. v. Coombs et al.*; 342 Pa. 268, 271 A| 2d 315: "Judicial decrees cannot be founded on possibilities". Were these "mistake" votes? On this there is absolutely no evidence whatsoever, and I will not classify, simply by rote, the 5000 odd votes cast in this manner as "mistakes" and reject them out of hand. If any conclusion is a pure "guess", it is the majority's conclusion that the votes in Row C were in "protest" or "cross-over" or by way of "mistake". The fallacy of the majority's position in this respect is self-evident: its complete rejection of the factual date on this record. What is even more astounding is the clear implication in the majority opinion that, even if the voters' intent were ascertained, such intent would not be recognized because voters, in the manner of their voting, failed to comply with the letter of the election statute!!

Moreover, we cannot, and must not, overlook the fact that it was the carelessness on the part of the Board in permitting the levers in panel "C" to remain unlocked

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votes (about 3 to a machine) were cast by voters, who, like the rest of the 5624 voters, voted beneath the name of the candidate instead of above the name.

and susceptible of operation which created the condition on the basis of which we are now asked to invalidate these 5624 votes. Over eighty years ago, this Court in *Contested Election of Wheelock,* 82 Pa. 297, 299, said: "If we, by our decision, should permit the carelessness . . . of [election] officers . . . to defeat the election . . . , we would thus make the people suffer for an act in which they did not participate, and which they did not sanction." More recently, we arrived at the same result in *Simon,* supra.

Appellee asks this Court to invalidate the 5624 votes cast in Row C in the Democratic senatorial contest as well as all the other votes cast in Row C for other candidates. In so doing, reliance is placed principally on *Flynn,* supra, *Weber Appeal,* 399 Pa. 37, 159 A. 2d 901, and *Application of Lester et al.,* 127 N. Y. S. 2d 272. Factually, both *Flynn* and *Weber* completely differ from the case at bar and are, therefore, inapposite. Moreover, *Flynn* dealt with statutory provisions applicable to paper ballots, not voting machines, and *Flynn* represents a rule of extreme rigidity no longer followed by this Court. Even if *Lester* had been determined under statutory provisions similar to the statutory provisions as to voting-machine voting in Pennsylvania—which it was not—even so I am neither bound by *Lester* nor impressed by its rationale.

Great emphasis is placed by the majority on the specimen ballots which, in the majority view, contained "clearly worded instructions" and a "crystally clear illustration" on the manner of voting, instructions *allegedly ignored* by the voters. The printing and delivery of specimen ballots is covered by the Election Code (art. X, § 1007) but it is significant that when the legislature provided the instructions to be given by election officers to voters on voting machines, specimen ballots were not mentioned (Election Code, § 1216(a), (b)). To say, as does the majority, that the voters *ignored* the specimen ballots clearly implies that the voters *saw* these ballots but there is no evidence such

ballots either were seen by, or available to, the voters. As a matter of fact, even the legislature did not contemplate that each voter receive a specimen ballot because it required delivery of specimen ballots to the election officers, only in the ratio of one specimen ballot for each five official ballots. Moreover, specimen ballots "are supposed to be like the [official ballots] in every essential particular" (*Knight v. Coudersport Borough*, 246 Pa. 284, 288, 92 A. 299) and the specimen ballots in the wards involved in this appeal were not "like the official ballots". On the specimen ballot, the levers are shown in the ballot labels wherein appeared the candidates' names; on the machine the levers were outside the ballot labels. On the specimen ballot, in the Democratic column and *below* the word "Democratic", was the letter "B" followed by a pointing hand which did not point to any row of levers; on the voting machines, the letter "B" is *above* the word "Democratic" and the pointing hand points to the levers in panel "B". A comparison of the specimen ballot and the face of the voting machine readily indicates the non-conformity of the former with the latter.

The majority takes refuge in the statement that the machines were "clear to every one". The weakness of this statement is well-illustrated by an incident which took place in the hearing in the court below when the very intelligent counsel for the Board, requested by the court to point out the levers in panel "C", depressed the levers in panel "D". This incident emphasizes, if any emphasis be needed, the complexity and intricacy of the voting machines which confused these voters.

The power to throw out ballots should be exercised very sparingly and only for "compelling reasons" (*Bauman Election Contest Case*, 351 Pa. 451, 454, 41 A. 2d 630) and "the rights of voters are not to be prejudiced by the errors or wrongful acts of election officers" (*Wilkes-Barre Election Contest*, 400 Pa. 507, 513, 162 A. 2d 363).

In summary, I am of the opinion that: (1) Section 1216(d)—which establishes the guideline for voting on voting machines at primary elections—does not, *although it should,* proscribe the depression of a lever *below* the name of a candidate; (2) under the language of the carelessly drafted Section 1216(d), at best, it is doubtful that the depression of a lever below the name of a candidate violates Section 1216(d) and any doubt in the construction of the statute must be resolved in favor of the voter; (3) even if the manner of voting in the case at bar be considered a violation of Section 1216(d), the violation was of such nature, that, if the voters' intent can be ascertained, such intent should govern; (4) it is clear beyond question that the voters, depressing the levers in panel "C", *intended* thereby to vote for the candidate whose names were *above* such levers; (5) the suggestion in the majority opinion that the votes recorded in Row C were "protest", "cross-over" or "mistake" votes is based on conjecture and not upon proof of the quality upon which a judicial decree can be predicated; (6) even though the operation of the levers in panel "C" violated Section 1216(d), the intent of the voters being evident, there is no "compelling reason" to justify the invalidation of the votes and disfranchise thousands of well-intentioned voters.[28]

Lastly, I am reminded that in *Simon Election Case,* 353 Pa. 514, 519, 46 A. 2d 243, we said: "The courts have never been able to lay down a precise standard by which it can be determined in a given case whether the irregularities [on the part of the officials conducting an election and making the electoral count] are of sufficient magnitude to justify the rejection of an entire poll in any district in

28. It is interesting to note the perspective of the appellee, the court below and the majority of this Court which is directed to and concentrated on the fact that the questioned votes were cast in "blank spaces". Such perspective overlooks completely the fact that the thrust of Section 1216(d) is directed to the operation of the levers, not to the place of recordation of the votes. The criterion by which the validity of the votes cast must be determined is *exclusively* that furnished by the statute.

which the question arises. The facts in each case must be considered and a determination reached as to whether justice is more likely to be done by counting the votes, despite the irregularities, or by refusing to count them because of the irregularities." Under the facts as presented on this record, I am convinced that "justice is more likely to be done by counting the votes" than "by refusing to count them".

The right to vote for United States Senator is protected and guaranteed by the Constitution of the United States (Art. I, Sec. 2 and 3; 17th Amendment). The right to vote obviously carries with it the right to have one's vote counted. In *U. S. v. Classic*, 313 U. S. 299, 314-16, 61 S. Ct. 1031, 85 L. Ed. 1368, the U. S. Supreme Court has recognized as a right "secured by the Constitution" the right of voters *"to cast their ballots and have them counted"*. As a result of the majority view thousands of voters have been denied this constitutional right. The Supreme Court of the United States in *Gray v. Sanders*, 372 U. S. 368, 380, — L. Ed. —, declared: "The right to have one's vote counted has the same dignity as the right to put a ballot in a box." See also: *Wesberry v. Sanders*, 376 U. S. 1, 11 L. Ed. 2d 481, 486. A study of the majority opinion does not reveal any sound, let alone *compelling*, reason for the denial of this right.

The record in this case and our applicable law, statutory and decisional, compel me to recognize the intent of the voters. I cannot in good conscience on the facts of this case be a party to the disfranchisement and denial of the constitutional right of these thousands of voters. In my opinion, these votes should be validated; right and justice command that result. I would reverse the order of the court below.

Mr. Justice O'Brien joins in this Dissenting Opinion.

SUPREME COURT OF PENNSYLVANIA
Eastern District

Patrick N. Bolsinger
Prothonotary

George W Dunn Jr
Deputy Prothonotary

Philadelphia 19107

August 7, 1964.

Abraham E. Freedman, Esq.,
1415 Walnut St.,
Philadelphia, Pa., 19102.

In re: Petition of Democratic County Committee of Philadelphia on behalf of all its Endorsed Candidates for Nomination at the April 28, 1964 Primary Election, etc.—Appeal of Democratic County Committee of Philadelphia, etc.

No. 329 January Term. 1964

Dear Mr. Freedman:

The following Order has been entered on the Amended Petition for Reconsideration and/or Reargument, filed in the above entitled proceeding:

"August 7, 1964

Per Curiam.

Petition denied. Further proceedings to stay for ten days."

Very truly yours,

GEORGE W. DUNN, JR.
Deputy Pronothary

GWDJr:RWH

cc: Philip Kalodner, Esq., 306 S. 19th St., Philadelphia, Pa.

Edward E. Russell, Esq., 1302 Land Title Bldg., Philadelphia, Pa., 19110

Tyson W. Coughlin, Esq., 1035 Land Title Bldg., Philadelphia, Pa., 19110

Levy Anderson, Esq., First Deputy City Solicitor, 702 City Hall Annex, Philadelphia, Pa., 19107

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN RE: Petition of Democratic County Committee of Philadelphia on behalf of all its Endorsed Candidates for N nination at the April 28, 1964 Primary Election in Wards 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 and 58. Appeal of DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA	No. 329 January Term, 1964 Appeal From Order of Court of Common Pleas No. 2 of Philadelphia County, March Term, 1964, No. 5446.

ORDER.

Filed: August 11, 1964

After careful consideration by all of the members of this Court sitting on this appeal of both the original and the amended petitions of the Democratic County Committee for a reconsideration of our Order of July 27, 1964 and/or a reargument of this appeal, and after a careful consideration of all the exceptions filed to the Order of August 7, 1964, as well as all other matters brought to our attention since our Order of July 27, 1964, this Court, although divided upon the merits of the appeal, is unanimous in its opinion that no useful purpose can be served by either a reconsideration of our Order of July 27, 1964, or a reargument of the merits of this appeal.

Therefore, this 11th day of August, 1964, the petitions, both original and amended, for a reconsideration of our Order of July 27, 1964, and/or a reargument of this appeal are denied and the exceptions to the Order of August 7,

1964 are dismissed. That portion of the Order of August 7, 1964, staying proceedings for a 10-day period from that date shall remain in full force and effect.

By THE COURT,

JOHN C. BELL, JR., Chief Justice
BENJAMIN R. JONES, Justice
MICHAEL J. EAGEN, Justice
HENRY X. O'BRIEN, Justice
SAMUEL J. ROBERTS, Justice

EXCERPTS FROM UNITED STATES CONSTITUTION.

Article 1.

Section 2, Clause 1. House of Representatives; composition and election of members.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article 1.

Section 3, Clause 1. Senate; composition; election of Senators.

[The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.]

Article 1.

Section 4, Clause 1. Congressional elections; time, place, and manner of holding.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Amendment XVII.—Popular Election of Senators.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

EXCERPTS FROM ELECTION CODE.

Act of June 3, 1937, P. L. 1333.

Art. XII § 1216.

(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed. At elections, he may vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the names of candidates of his choice are placed,

Art. XI § 1111.

(c) On or before the fortieth day preceding an election, the county election board shall mail to the chairman of the county committee of each political party, which shall be entitled under existing laws to participate in primary elections within the county, and to the chairman or presiding officer of any organization of citizens within the county having as its purpose or among its purposes the investigation or prosecution of election frauds, which has registered its name and address, and the names of its principal officers with the county election board at least fifty (50) days before such election, a written notice stating the times when and the place or places where preparation of the machines for use in the several election districts in the county will be started. One representative of each of such political parties, certified by the respective chairmen of the county committees of such parties, and one representative of each such organization of citizens, certified by the respective chairmen or presiding officers of such organizations, shall be entitled to be present, during the preparation of the machines, and to see that the machines are properly prepared and are placed in proper condition and order for use: * * *

§ 3007. Requirements of voting machines.

Art. XI § 1107.

No voting machine shall, upon any examination or re-examination, be approved by the Secretary of the Commonwealth, or by any examiner appointed by him, unless it shall, at the time, satisfy the following requirements:

* * *

(e) It shall preclude each voter from voting for any candidate, or upon any question, for whom or upon which he is not entitled to vote, and from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once, except in districts and for offices where cumulative voting is authorized by law.

(f) It shall be capable of adjustment by election officers, so as to permit each voter at a primary election to vote only for the candidates for nonpartisan nomination, if any, and for the candidates seeking nomination by the political party in which he is registered and enrolled, if he is enrolled as a member of a political party, and so as to preclude him from voting for the candidates seeking nomination by any political party in which he is not enrolled.